TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN, FRANKLIN H. MACKEY, TRUSTEE; EDWARD A. COLBURN, ELIZABETH F. COLBURN, GERTRUDE H. COLBURN, F. HELEN COLBURN, LOUISE B. COLBURN, AN INFANT, BY HER NEXT FRIEND, ARTHUR R. COLBURN, APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR; AUGUSTA F. COLBURN, KATIE GRANT, ANNIE BURKE, MARTHA HAMBLIN, AND MARTHA FITZ JAMES SCALES LEONARD.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 6, 1900.

(17,868.)

(17,668.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 5, 1901.

1 In the Court of Appeals of the District of Columbia.

ROLLINSON COLBURN ET AL., Appellants,
vs.
ROBERT E. GRANT ET AL. } No. 952.

Supreme Court of the District of Columbia.

ROLLINSON COLBURN ET AL.
vs.
ROBERT E. GRANT, Executor, ET AL. } No. 20130. In Equity.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Bill for Accounting.

Filed Nov. 9, 1899.

In the Supreme Court of the District of Columbia.

ROLLINSON COLBURN; FRANKLIN H. MACKEY, Trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, Louise B. Colburn, an Infant, by Her Next Friend, Arthur R. Colburn, Complainants,
vs.
ROBERT E. GRANT, Executor; AUGUSTA F. Colburn, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard, Defendants. } In Equity. No. 20130, Docket 46.

To the supreme court of the District of Columbia, sitting in equity:

The complainants respectfully state as follows:

1. The complainant Franklin H. Mackey is a resident of the District of Columbia and sues as trustee, as hereinafter stated. The complainant Rollinson Colburn is a resident of the town of Takoma Park, in the State of Maryland. The complainant Edward A. Colburn is a resident of Churchville, in the State of Maryland. The complainants Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, and Louise B. Colburn are residents of Philadelphia,
2 in the State of Pennsylvania. The complainant Arthur R. Colburn is a resident of the town of Takoma Park aforesaid, and sues as next friend of the complainant Louise B. Colburn. All of said complainants are citizens of the United States and sue in their

own right, except the complainants Franklin H. Mackey, trustee, as hereinbefore stated, and Louise B. Colburn, who is an infant of the age of twenty years, and sues by her next friend, Arthur R. Colburn.

2. The defendant Robert E. Grant is a resident of the District of Columbia, and is sued as executor, as hereinafter stated. The defendants Augusta F. Colburn is a resident of Philadelphia aforesaid; Katie Grant is the wife of the defendant Robert E. Grant, and is a resident of the District of Columbia; Annie Burke is a resident of the District of Columbia; Martha Hamblin is a resident of Brooklyn, State of New York; Martha Fitz James Scales Leonard is a resident of Cambridge, in the State of Massachusetts. All of said defendants are citizens of the United States, and are sued in their own right, except the defendant Robert E. Grant, who is sued as executor, as aforesaid.

3. That on, to wit, the 27th day of May, 1872, Augustus G. P. Colburn, of the city of Newark, county of Essex, State of New Jersey, departed this life in the said city of Newark, leaving his last will and testament, dated May 25, 1872, whereby he devised to his said son, George Fitz James Colburn, for and during his natural life a certain dwelling-house in said city of Newark, with power to the trustees named in said will, to wit, said George Fitz James Colburn and John W. Taylor, to sell the same and the proceeds to invest and the interest to pay to the said George Fitz James Colburn during his lifetime. Said will also provides that in case of the death of his said son without issue the said interest should be paid to the brothers and sisters of said Augustus G. P. Colburn for and during their natural lives, and in case of the death of any of them after his decease, then such income is to be paid to the survivors of said brothers and sisters equally, and upon the death of all his said brothers and sisters the principal so invested was to go to and vest in the "children" of his brother, Hervey Colburn. An exemplified copy of said will is herewith filed, marked Exhibit A.

4. Complainants aver that on the 21st day of September, 1897, said George Fitz James Colburn departed this life in the city of Washington, District of Columbia, unmarried and without issue, his wife having predeceased him; that all the brothers and sisters of the said Augustus G. P. Colburn are now dead, all having predeceased the said George Fitz James Colburn, except P. D. Miranda Kimball (born Colburn), who was a sister of the said Augustus and who died on the 22nd day of December, 1897, in the said city of Newark, at the age of 85 years.

5. That the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of the said Hervey Colburn, his other children having predeceased the said George Fitz James Colburn. The complainants Elizabeth F. Colburn,
3 Gertrude H. Colburn, F. Helen Colburn, and Louise B. Colburn are the only children of H. Hobart Colburn, deceased, who was a son of the said Hervey Colburn, and who predeceased the said George Fitz James Colburn. The said Rollinson Colburn and Edward A. Colburn hereby waive any question as to whether

the said children of said H. Hobart Colburn take any interest under the will of the said Augustus G. P. Colburn by reason of the devise to the "children" of the said testator's brother, Hervey, and are willing that they should participate as devisees and distributees in said estate should they or any of them be living at the time the said fund becomes distributable, and that they shall take *per stirpes*.

6. That said John W. Taylor died in the year 1893, having predeceased the said George Fitz James Colburn; that said George Fitz James Colburn departed this life on the 21st day of September, 1897, leaving a last will and testament dated the 28th day of April, 1897, and now duly probated and on file among the records of the register of wills of the District of Columbia, a true copy whereof is herewith filed, marked Exhibit B; that complainants are informed and believe, and so aver, that said George Fitz James Colburn left no real estate; that by said last will and testament the defendant Robert E. Grant was nominated the executor thereof, and has duly qualified as such executor.

7. That the complainant Franklin H. Mackey has been duly appointed trustee by the decree of this court on the 15th day of December, 1898, in equity cause No. 18728, wherein the complainants herein, except said Franklin H. Mackey, were compiainants and all of the defendants herein were defendants thereto, and said Mackey has duly qualified as such trustee.

8. That some time during the administration of the trust estate left by said Augustus G. P. Colburn, as aforesaid, by the said George Fitz James Colburn and John W. Taylor, trustees, the said dwelling-house was sold by them for a large sum of money, aggregating, as your complainants are informed and believe, and so aver, the sum of twenty-eight thousand dollars ($28,000); that upon the death of the said John W. Taylor the said George Fitz James Colburn became surviving trustee and continued the administration of said trust until his death, as aforesaid, on the 21st day of September, 1897, in the city of Washington, District of Columbia.

9. That of the said $28,000 there has come into the hands of the complainant Franklin H. Mackey, substituted trustee as aforesaid, the sum of seventeen hundred dollars ($1,700) in cash and two promissory notes, one for sixteen hundred dollars ($1,600) and one for seventeen hundred dollars ($1,700), belonging to said trust fund, which notes have been subsequently paid, with interest, all of which was a part of the principal of said trust estate and which was delivered to said Mackey by the American Security and Trust Company of this city, in whose care it had been left, as complainants are informed and believe, by the said George Fitz James Colburn;

4 that said complainant, Mackey, has been unable to collect any more of the said trust fund than the said cash and notes, amounting in the aggregate to about $5,000.

10. That the complainants are advised that the said Robert E. Grant, as executor of the estate of said George Fitz James Colburn, is liable to account to complainants for the deficiency in the fund which came into the hands of the said George Fitz James Colburn and John W. Taylor and which thereafter came or should have

come into the hands of the said George Fitz James Colburn as surviving trustee: that no bond was given by said Colburn and Taylor, trustees as aforesaid, and the only recourse which complainants have for any deficiency that may exist in said fund is against the estate of the said George Fitz James Colburn, all of which estate, as your complainants are informed and believe, came into the hands of the said Grant, as executor as aforesaid.

The defendants other than the defendant Robert E. Grant are made parties to this bill, in order that they may protect as they may be advised such interests as they may have in the estate of George Fitz James Colburn as legatees and distributees thereunder.

The premises considered, complainants therefore pray:

Prayers.

I. For process against all of the defendants, requiring them to answer the exigency of this bill, but without oath, the complainants expressly waiving the same.

II. That a reference be had to the auditor of this court to take and report an account of the trust estate of said Augustus G. P. Colburn as it came or should have come into the hands of said trustees, and of their acts and doings in respect thereof, and for how much thereof the said surviving trustee was properly accountable at the time of his death.

III. That upon the coming in of said report your complainants may have a decree against the said Grant, as executor of said estate of said George Fitz James Colburn, and, if necessary, against any of the other defendants, for so much of the estate of the said George Fitz James Colburn, whether the same consists of money or other valuables, as may be justly payable to complainants or any of them by reason of his, the said George Fitz James Colburn's, liability incurred as trustee of the estate of Augustus G. P. Colburn aforesaid.

IV. That said Grant be enjoined from distributing any portion of the estate of the said George Fitz James Colburn which has come into his hands or which may hereafter come into his hands, as executor as aforesaid, until the final decree of this court.

V. That the complainants may have such further and other relief as the nature of the case may require and to the court may seem just and proper.

FRANKLIN H. MACKEY, *Trustee.*

5 The defendants to this bill are:

1. Robert E. Grant, executor,
2. Augusta F. Colburn,
3. Katie Grant,
4. Annie Burke,
5. Martha Hamblin, and
6. Martha Fitz James Scales Leonard.

FRANKLIN H. MACKEY, *P. P.*, AND
ARTHUR R. COLBURN,
Solicitors for Compl'ts.

Franklin H. Mackey, being duly sworn, deposes and says that he has read the foregoing bill by him subscribed; that he knows the contents thereof, and that the facts therein stated upon his personal knowledge are true, and those stated upon information and belief he believes to be true.

FRANKLIN H. MACKEY.

(Endorsed.)

It is hereby stipulated that the copy of the amended bill may be filed and stand for the amended bill, the same having been lost or misplaced.

FRANKLIN H. MACKEY,
ARTHUR R. COLBURN,
For Compl'ts.
GORDON & GORDON,
Sol's for Def'ts.

Nov. 7th, 1899.

EXHIBIT A TO BILL OF COMPLAINT.

In the name of God. Amen. I, Augustus G. P. Colburn of the city of Newark in the county of Essex and State of New Jersey, being of sound mind memory and understanding, do make and publish this my last will and testament, in manner following, that is to say.

1. It is my will and I do order that all my just debts and funeral and testamentary expenses be duly paid and satisfied after my decease.

2. I give, devise and bequeath to my son George Fitz James Colburn for and during his natural life my dwelling-house and lot known and designated as No. 15 Cedar street, Newark aforesaid and after his death, to his wife Martha A. Colburn (should she survive him) for and during her widowhood. In case my said son should die, leaving issue, then, I give the said house and lot to said issue, in fee-simple, in equal shares, from and after the death of my said son and after the death or remarriage of his said wife.

3. I give and bequeath to my brother Edmund two hundred dollars, and to each of my sisters fifty dollars, provided my said brother and sisters shall survive me.

6 4. In case my said son should die without issue, I hereby direct my surviving executor hereinafter named, to sell and dispose of my said house and lot in Cedar street, within one year after the termination of the interest of his widow therein, either at public or private sale, as he shall deem most expedient and advantageous for my estate, and the net proceeds arising therefrom, to invest as safely and advantageously as practicable, and the income accruing therefrom to pay over at stated and convenient times, to such of my brothers and sisters as may survive me, in equal shares for and during their natural lives, and in case of the death of any one of them after my decease, then such income is to be paid to the survivors of them, equally, and upon the death of all of my said

brothers and sisters the principal so invested is to go to, and vest in the children of my brother Hervey Colburn.

5. In case my said executors shall deem it advantageous or expedient, I hereby authorize and empower them to sell and convey, at any time after my decease my said house and lot, or any part of said lot, either at public or private sale and thereupon to invest, as securely and advantageously as practicable the net proceeds thereof, and pay over the income arising therefrom, to my said son during his natural life, and thereafter to his said wife, if she shall survive him during her natural life, and upon the decease of my said son without issue and the decease or remarriage of his said wife, to dispose of said proceeds and the income thereof as provided in the last preceding item of this my will, and it is my will that, in case my said executors or the survivor of them shall deem it expedient, they or he shall be at liberty to vary the securities upon which the proceeds of my said house and lot shall be invested by them or him, so that said proceeds shall be as productive and secure and be as beneficial to my said son and daughter-in-law, as practicable.

6. All my estate real and personal, remaining after the payment and satisfaction of the debts, expenses, legacies and devises hereinbefore mentioned, and not hereinbefore otherwise disposed of I give devise and bequeath to my said son absolutely and forever.

7. Lastly I hereby nominate, constitute and appoint my son George Fitz James Colburn and my friend John W. Taylor of Newark aforesaid executors of this my last will and testament.

In witness whereof, I have hereto set my hand and seal this twenty-fifth day of May eighteen hundred and seventy-two.

A. G. P. COLBURN.

Signed, sealed, published, and declared by the said testator as and for his last will and testament in the presence of us, who were present at the same time, and who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

(The words "without issue" interlined.)

MARTIN H. SCOTT.
A. H. DOUGLAS.

7 Filed April 4, 1899. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Trustee, ET ALS. *vs.* ROBERT E. GRANT, Executor, ET ALS. } Equity. No. 20130.

Answer of the Defendant Robert E. Grant, Executor, to the Bill of Complaint.

1. He admits the allegations of the first paragraph of the bill of complaint.

2. He believes the allegations of the second paragraph of the bill

of complaint are correct, except that the defendant Martha Fitz James Scales Leonard is a resident of the State of New Hampshire, instead of being a resident of the State of Massachusetts, as alleged.

3. He admits the allegations of the third paragraph of the bill of complaint, and has no reason to doubt that the paper filed and marked Exhibit "A" is in fact a certified copy of the last will and testament of the said Augustus G. P. Colburn, deceased.

4. He admits that the said George Fitz James Colburn died on the 21st day of September, A. D. 1897, unmarried and without issue, his wife having predeceased him, and he also admits that all the brothers and sisters of the said Augustus G. P. Colburn are now dead, all having predeceased the said George Fitz James Colburn except the said P. D. Miranda Kimball, who has since died.

5. He admits that Rollinson Colburn and Edward A. Colburn are the only surviving children of Hervey Colburn, and that Elizabeth F. Colburn, Gertrude H. Colburn, and F. Helen Colburn, and Louise B. Colburn are the only children of H. Hobart Colburn, deceased, who was a son of the said Hervey Colburn, the latter having predeceased the said George Fitz James Colburn.

6. He admits that the said John W. Taylor died on the 20th day of September, 1893, and that the said George Fitz James Colburn died on the twenty-first day of September, 1897, leaving a last will and testament dated the 28th day of April, 1897, duly probated and of record, as alleged. He further admits that he was by said will nominated as sole executor and has duly qualified as such.

7. He admits that the plaintiff Franklin H. Mackey has been appointed trustee, as alleged, by decree of this honorable court passed in equity cause No. 18728.

8. He admits that the dwelling-house referred to in the eighth paragraph of the bill of complaint was sold, and that the sum of twenty-seven thousand dollars net was realized as proceeds from said sale. Further answering this paragraph, this defendant says: The allegation in said bill of complaint wherein the plaintiffs seek to convey to the mind of the court the impression that the testator of this defendant came into possession of the sum of twenty-
8 eight thousand dollars arising from the sale of said house is a clear intention to mislead the court in the premises, for it is well known to all the plaintiffs that the net sum realized therefrom was but twenty-seven thousand dollars, and it is further well known to said plaintiffs that but a small part of said sum of twenty-seven thousand dollars, to wit, five thousand dollars thereof, ever came into the possession or under the control of this defendant's testator.

9. In answer to the ninth paragraph of the bill, this defendant says: It is true, as alleged, that there has come into the hands of the said Franklin H. Mackey, as trustee, the sum of over five thousand dollars, being the portion of the trust fund aforesaid in the possession and under the control of the decedent, George Fitz James Colburn, at the date of his death, and which sum was directed to be paid to the said Mackey by decree of this honorable court in equity

cause No. 18728. Further answering, this defendant says that the said Mackey has not only collected all the money held by the said George Fitz James Colburn as trustee under the trust referred to, but has also collected interest due and payable to the estate of the said George Fitz James Colburn, being interest upon that portion of the said fund of twenty-seven thousand dollars which was invested in notes and under the control of said Colburn, which interest had accrued at the date of the death of the said George Fitz James Colburn, and which is now payable to his estate.

10. This defendant denies that he is liable in any way to account to the said trustee, Mackey, for any estate held by said George Fitz James Colburn, as alleged, having fully settled with the said trustee by the delivery to him, as aforesaid, under decree of this honorable court, of the notes, cash, &c., amounting to five thousand dollars and more, under the control of the said Colburn, as above set forth. He denies that he is liable to account to the said Mackey or to any one else for the deficiency alleged to exist between the said sum of twenty-seven thousand dollars constituting said net trust fund and the amount turned over to the said trustee, Mackey, as aforesaid; and, further answering, he says:

As was and is well known to all the parties in interest herein, the management and control of all of the said trust fund of twenty-seven thousand dollars, except the said sum of five thousand dollars, was in the hands of the cotrustee of the said George Fitz James Colburn, namely, John W. Taylor, who resided in the city of Newark, in the State of New Jersey. This was with the full knowledge of the parties in interest and without opposition on their part. The said Colburn, cotrustee, removed from the city of Newark in the year 1873, and came to reside in the District of Columbia, where he continued to reside until his death, as aforesaid. During all that time, from the year 1873 to the year 1893, when said Taylor died, the latter had continued to remit to the said Colburn, who was entitled thereto as *cestui que trust*, regularly the income from the said sum of twenty-two thousand dollars under his control, and no reason for doubting his honesty or integrity or as to the proper management of the estate in his possession had ever arisen. The said Taylor was at the time of his appoint-
9 ment and up to the date of his death one of the most prominent lawyers in the city of Newark. His reputation and position in society and in his profession was of the very highest, and such was the esteem in which he was held that large estates were committed to his care and management. He was an ex-judge, ex-State senator, and generally conceded to be a man of probity and of great executive ability. Under these circumstances the active management of the estate in the city of Newark was left to his care, the said Colburn being, as above set forth, a resident in the District of Columbia. All these facts were fully known to the children of Hervey Colburn and they acquiesced in the course pursued in the premises. In the year 1893 the said Taylor died by his own hand, and it was then discovered that he had squandered and wasted many estates under his control, amon-st others the estate of the said Augus-

tus G. P. Colburn, and that the only portion of said trust fund that remained was the portion in the hands of the said George Fitz James Colburn. All of which was fully known to the complainants herein, as will appear from the original bill filed by them in cause No. 18728, equity, in this honorable court. Further answering, this defendants says that claim was made against the estate of the said John W. Taylor for said trust fund, for which he was responsible at the date of his death, to wit, the said sum of twenty-two thousand dollars, and in August, 1895, when a distribution of the estate of said Taylor was made amongst his creditors, there was paid to the said Colburn the sum of three thousand three hundred and forty-two dollars and forty-five cents, being fourteen and seven-tenths per cent. upon said claim, with interest from January 21st, 1894. This was fully known to the children of said Hervey Colburn, all of whom were then living, and they did not pretend, nor did any of them pretend, to hold the said George Fitz James Colburn responsible for the fund so lost, but, on the contrary, the only concern they exhibited in the matter was that the said George Fitz James Colburn would lose the income he had theretofore enjoyed from said fund, and in order to provide as far as possible for the loss thus entailed upon the said George Fitz James Colburn they all, by papers dated respectively the 6th, 9th, and 11th days of September, 1895, gave their full consent to the said George Fitz James Colburn using the said sum of three thousand three hundred and forty-two dollars and forty-five cents, received by him from said Taylor's estate, as aforesaid, if he so desired, and thereupon all resigned any interest they might have in said fund in favor of the said Colburn; and this defendant alleges that it was the full intent of all the parties that the said Colburn should be, and he was thereby, released from any liability or claim on their part by reason of the loss of the said fund by the misuse thereof by said Taylor.

And, further answering, this defendant says that, acting upon the authority so vested in him, the said George Fitz James Colburn, with full knowledge and approval of the said children of Hervey Colburn, appropriated said fund so received from said Taylor's estate in the purchase of an annuity for himself, which annuity was by him enjoyed until his death. This defendant further says that at no time during the period from the death of the said Taylor to the death of the said George Fitz James Colburn was it ever pretended or claimed that any liability or responsibility existed on the part of said George Fitz James Colburn on account of the portion of said fund lost by reason of the defalcation of said John W. Taylor, and that when the said sum of three thousand three hundred and forty-two dollars and forty-five cents was appropriated for the purpose of purchasing the annuity referred to, with the consent of the said children of the said Hervey Colburn, it was undoubtedly intended that such act on the part of the donors was to be in full acquittance of any possible claim they might have or might be supposed to have against the said George Fitz James Colburn; and this defendant further says that the idea of claiming any such liability is an afterthought that has only arisen since the death of said Col-

burn and because of the failure of the said Colburn to leave his small estate to the parties complainant herein. This defendant is advised and so claims that under all the circumstances of the case there is no equitable right or claim against the estate of his testator in the premises, and that the plaintiffs herein are estopped from claiming anything against said estate. He denies that they are entitled to any equitable relief, and he prays that he may be hence dismissed with his reasonable costs.

ROBERT E. GRANT.

GORDON & GORDON,
Solicitors for Defendant.

I solemnly swear that I have read the answer by me subscribed, and that I know the contents thereof. The facts stated of my personal knowledge are true, and the facts stated upon information and belief I believe to be true.

ROBERT E. GRANT.

Subscribed and sworn to before me this 23d day of February, A. D. 1899.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, JR., *Ass't Clk.*

Agreed Statement of Facts.

Filed Jul- 21, 1899.

In the Supreme Court of the District of Columbia.

FRANKLIN H. MACKEY, Trustee, ET AL. *vs.* ROBERT E. GRANT, Executor, ET AL. } Equity. No. 20130, Docket 46.

Stipulation of facts admitted.

In order to obviate the expense of taking testimony in relation thereto, it is hereby stipulated and agreed that the following are conceded as facts, and that the statements herein may be read and taken in this cause as established.

11 That the complainant Franklin H. Mackey, trustee, was appointed by decree of this court in equity cause No. 18728, and has qualified as such.

That the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of Hervey Colburn, who was a brother of Augustus G. P. Colburn.

That the complainants Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, and Louise B. Colburn are the only children of H. Hobart Colburn, a deceased child of the said Hervey Colburn; that said H. Hobart Colburn predeceased the said George Fitz James Colburn, and that all the above-named parties are now of full age.

That George Fitz James Colburn died in September, 1897, un-

married and without issue, his wife having died before him, and that all the brothers and sisters of Augustus G. P. Colburn predeceased the said George Fitz James Colburn except P. D. Miranda Kimball, who died on the 22nd day of December, 1897.

That under the will of the said Augustus G. P. Colburn the said George Fitz James Colburn and John W. Taylor were named as trustees, without bond, for the management of the trust portion of said estate, with power to sell the same.

That the real estate in the city of Newark, State of New Jersey, mentioned in the will of the said Augustus G. P. Colburn, was sold by said trustees shortly after the death of the testator, the net proceeds arising therefrom amounting to twenty-seven thousand dollars, which was paid part in cash and the remainder in subsequent installments, the latter installments being collected by the said Taylor.

That the said George Fitz James Colburn removed from the city of Newark in the year 1873, to the city of Washington, D. C., where he resided, except for a few months, up to the day of his death.

That John W. Taylor, one of the said trustees, was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death, in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death by his own hands on the 20th November, 1893.

That after the death of the said Taylor it was found that he had squandered many estates under his custody, amongst others the said estate of Augustus G. P. Colburn, except the sum of five thousand dollars, which was under the exclusive control of the said George Fitz James Colburn and which latter sum of $5,000 has been turned over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18728.

That the said trust estate, except the said sum of five thousand dollars referred to, was by the said George Fitz James Colburn left solely to the collection, management, and discretion of the said Taylor, who handled said sum without the co-operation, supervision, or knowledge of the said George Fitz James Colburn, the
12 latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

Upon the death of said Taylor, trustee, the said George Fitz James Colburn, as surviving trustee, made claim against the estate of said Taylor for the amount of the trust fund by him squandered, as aforesaid, and upon said claim of twenty-two thousand dollars he received a dividend of $3,342.45.

That by papers-writing dated respectively September 6, 9, and 11, 1895, Rev. Edward A. Colburn, Rollinson Colburn, and H. Hobart Colburn released all claim to the said $3,342.45 unto the said George Fitz James Colburn, and that thereupon the said George Fitz James Colburn purchased an annuity for himself, which he enjoyed until his death. Said paper-writing is in the following

form: "I hereby give my full assent that my cousin, George Fitz James Colburn, shall have full right to use the sum of $3,342.45 received by him from his father's estate, should he so have need, and do resign any interest I may have in said sum of $3,342.45 if he so desire to use it." Originals of above paper to be filed in this suit.

FRANKLIN H. MACKEY,
ARTHUR R. COLBURN,
Solicitors for Complainants.
GORDON & GORDON,
Solicitor- for Defendants Robert E. & Katie Grant, Annie Burke, Martha Hamblin, Martha F. J. Leonard.

The paper-writing referred to in the last paragraph of the "stipulation of facts" is as follows:

Filed Oct. 9, 1899.

SEPT. 6, 1895.

I hereby give my full assent that my cousin, George F. J. Colburn, shall have full right to use the sum of $3,342.45 rec'd by him from his father's estate, should he so have need, and do resign any interest I may have in said sum, $3,342.45, if he so desires to use it.

EDW'D A. COLBURN,
Residuary Legatee.

Churchville, Harford Co., Md.

Two other papers similar to the above, filed as exhibits, were signed by H. Hobart Colburn and Rollinson Colburn, residuary legatees, respectively.

Opinion of Justice Barnard.

Filed Nov. 3, 1899.

FRANKLIN H. MACKEY, Trustee, ET AL.
vs.
ROBERT E. GRANT, Executor, ET AL. } No. 20130. Equity.

The bill is filed in this cause to recover a trust estate left by the will of Augustus G. P. Colburn to two trustees named John
13 W. Taylor and George Fitz James Colburn, the complainant herein having been appointed trustee in equity cause No. 18728 in this court to take the place of those named by the said testator, they both being dead. The testator and the said trustees all lived in Newark, N. J., when the will was made and when the testator departed this life in 1872. Mr. Taylor was a prominent lawyer of good repute and continued such up to Nov. 20, 1893, when he committed suicide. After his death it was found that he had squandered trust funds to a large amount, including $22,000 of the corpus of the estate of Augustus G. P. Colburn.

The cotrustee, George Fitz James Colburn, who was a son of the testator, removed to the District of Columbia the next year after his

father's death, and continued to reside here from that time to the date of his death, Sept. 21, 1897.

By the said will these trustees were not required to give bond as such; they were empowered to sell a house and lot in Newark, in which said Geo. Fitz James Colburn was given a life estate, and in that event to reinvest the proceeds of sale and pay the interest to said life tenant, and at his death to pay over the principal to certain other relatives, now represented in this suit. It appears that this property was sold shortly after the testator's death for $27,000—part cash and part deferred payments. $5,000 of the principal, presumably out of the cash payment, was taken in charge by the son and brought to this city and invested and managed by him, and since his death his estate has paid that over to complainant Mackey, as trustee. The balance of the purchase-money was presumably paid over to said Taylor by the purchaser, and was retained by Taylor in New Jersey and managed by him, he remitting the interest to the life tenant in this city regularly up to the day of his (Taylor's) death.

After Taylor's death it was soon discovered that his affairs were in bad condition. The son, then sole surviving trustee, instituted proceedings against Taylor's estate, and finally recovered $3,342.45. The life tenant, being deprived of his usual income by the death and bankruptcy of his cotrustee and being an old man, applied to his relatives, the remaindermen, for leave to use this remnant of the corpus to purchase an annuity for himself, and they acceded to this request; whereupon he made use of this sum for that purpose. This was in September, 1895. The form of this agreement, signed by each of the then legatees or devisees in remainder, was as follows:

"I hereby give my full assent that my cousin, George G. F. Colburn, shall have full right to use the sum of $3,342.45, received by him from his father's estate, should he so have need, and do resign any interest I may have in said sum, $3,342.45, if he so desire to use it."

——— ———,
Residuary Legatee.

14 The remaindermen were then the three sons of Hervey Colburn, a deceased brother of the testator, Augustus G. P. Colburn, all of whom were of full age. Since then one of these remaindermen, H. Hobart Colburn, has died, and his children have taken his place in this matter. It is claimed by counsel for defendants that this consent on the part of the remaindermen, after the discovery of Taylor's default and the recovery of the small portion of the trust fund by the surviving trustee, was a forgiveness by them of any claim they might have had against the surviving trustee for the loss of the funds through any supposed negligence on his part.

I am not prepared to accept this proposition, but do consider this transaction as evidence tending to prove that these remaindermen did not regard the surviving trustee as being guilty of negligence

such as to render him personally liable for the losses caused by Taylor's squandering the trust funds. I only regard it as a matter of fact carrying presumptions of fact with it, but not as an absolute estoppel in law.

If, under all the circumstances of this case, it can be established as a matter of fact that the surviving trustee was guilty of negligence in allowing his cotrustee to collect, retain, and reinvest the trust funds in bad securities, or to use them himself without security, then I agree with complainants that his estate will be liable to make good the loss. The authorities on trustees are pretty much one way on that proposition. The real question in my mind is, what was the degree of diligence required, in equity and good conscience, of George Fitz James Colburn under the peculiar circumstances of this case? Had he any knowledge of danger to these funds such as should have caused him to make more definite inquiries of Taylor or to take legal proceedings against Taylor during his lifetime, or had he any reason whatever to suspect that all the funds in Taylor's hands were not securely invested?

This surviving trustee was himself very greatly interested in having the funds safely invested by Taylor, for his own existence largely depended on receiving the income as the life tenant. He had known Taylor all his life to be a trustworthy man, as well as a man of financial responsibility. The agreed statement of facts in this case contains the following statement on that subject: "That John W. Taylor, one of the said trustees, was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death, in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death, by his own hands, on the 20th of November, 1893."

The father had known Taylor to be such a man as he could trust as the legal custodian of his estate without requiring bond. It may be presumed that the complainants and their ancestor, through whom some of them claim, had the same opinion of Taylor. Certain it is that no one interested in the estate, either as life tenant or remainderman, ever asked the court to require Taylor to give a bond or to state an account and show how the funds were invested.

It is also clear that so long as Taylor lived the interest was promptly paid to the life tenant, which would be evidence to him that the corpus was still intact and well invested.

Another fact seems to be undisputed, and that is that the life tenant, as a trustee, was strictly honest and trustworthy, without necessity of bond being required of him, for he had $5,000 of the trust fund in this jurisdiction safely invested and where the remaindermen obtained it on his death without delay or trouble. If he can be held liable for Taylor's misdoings, it must be done, it seems to me, on constructive negligence, and cannot be for failure on his part to do anything which he had any reason to suppose was necesssary to be done by him during Taylor's lifetime. He may have acted unwisely to have allowed Taylor to collect and retain so much of the trust fund for so long a time, but can it be said that he acted in this matter in

an unreasonable manner? If not, if he was a reasonable man and acted in this trust matter as he did with his own property, it proves beyond doubt that he acted in good faith and in perfect confidence, for which he seems to have had ample ground, and under many of the authorities that would be sufficient to excuse him for the loss caused by his cotrustee. If the surviving trustee had not been the life tenant and had not promptly received his interest from Taylor, or if he had any fact to put him upon inquiry or to have given him any reason to suspicion Taylor's want of care or honesty, and he had not forthwith taken legal steps to prevent the loss, he would undoubtedly have become bound to make the loss good; but under the statement of facts in this case and the presumptions of fact and inferences that seem naturally to arise from the facts stated, I cannot convince myself that it would be equitable and just to conclude that the surviving trustee's estate should be held for the loss for which Taylor was in fact alone responsible.

I think it may well be presumed that the remaindermen knew just as much about the situation as the surviving trustee did during Taylor's life; that they knew the $5,000 was in this city, in Colburn's hands, and the $22,000 in Newark, in Taylor's hands, and that the income was regularly paid to the life tenant, and if they had any knowledge of anything that would in any way indicate that the estate in Taylor's hands was in peril and had reason to believe Colburn was ignorant of it and yet did nothing themselves to inform Colburn or call Taylor to account, that would have been bad faith on their part, sufficient to bar them from recovery in this suit. I do not believe, however, they had any such knowledge of wrong-doing, but I do believe that they and Colburn alike had implicit faith and confidence in Taylor until after his suicide, and the subsequent proceedings indicate that they were in perfect harmony, and that the remaindermen made no claim that Colburn was to blame or that he was in any way responsible for the loss they had jointly sustained while the said Colburn lived, nor until the filing of this bill since his death.

It is claimed in argument that complainants were only contingent remaindermen, and as such had no standing in court to require Taylor to give bond or to render an account. The will pro-
16 vided that the son and his wife should have a life estate in the fund, and thereafter the testator's brothers and sisters, if they were still living, should receive the income for their lives, and upon the death of all of his brothers and sisters, then the principal of the fund should go to the children of the testator's brother, Hervey Colburn. I hold under the language of the will that these were vested remainders, and that the children of Hervey Colburn had a right at any time to inquire into the condition of this trust estate and to apply to court to require a bond from the trustees if the fund was in danger, or to require an account as to how it was invested.

Doe, lessee of Poor, *v.* Considine, 6 Wall., 458.

But even if these were contingent remaindermen they would have the same right to protection. Clarke *v.* Devereaux, 1 S. C., 172; Perry on Trusts, sec. 816. On the other hand, it is contended that complainants never imagined that their cousin, the surviving trustee, had been in the least to blame for Taylor's default until after his death, and it was known the small estate left by him in his own right had been partially bequeathed to others beside the complainants, and that they were displeased at this, and filed this claim as a result of such feeling, hoping in that way to practically break the will and obtain, as creditors, the whole estate, estimated to be some $1,500 or $2,000. This theory has some foundation in fact, so far at least as the idea of holding Colburn responsible for his cotrustee's actions while he was living is concerned. Instead of making any such claim then the remaindermen kindly relinquished all claim to the amount recovered by the surviving trustee and allowed it to be used by him to buy an annuity, thus plainly showing by their actions that they thought he was not at fault. The motive which may have led them to bring this suit (and I believe they admit that his ingratitude in failing to bequeath his small estate all to them did induce them to begin this litigation) cannot be of any great value in deciding the case upon its merits, except as it may reflect upon the situation as it was during Colburn's life. It might well have been that the fact of leaving $22,000 of this trust fund in Taylor's hands was suggested by complainants as being better security for them, because it appears that Colburn was a man of very little means and small experience in handling affairs, and that he was a life tenant, and if controlled by him might have been tempted to use the principal, while the testator and every one else believed Taylor to be a man of means as well as of experience in such matters of trust and thoroughly honest and one who would not allow the life tenant to encroach upon the principal, no matter how much he might need or desire to do so. As both trustees were exempt from giving bond, it may well be supposed that the remaindermen were satisfied to allow the one trustee, who was believed to be best qualified, to take upon himself all the responsibility. If such was in fact the case and loss came of it, of course they could not be allowed to maintain a suit in equity against the other trustee after the loss had occurred. It may be an easy thing to lock the stable door after the horse is stolen, but it does not bring back
17 the horse. And after a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold some one else fairly responsible for it the point of view held by the party sought to be made liable at and before the loss occurred is the only safe point of view to assume. From the light of the circumstances, as thus shown, I cannot convince myself that George Fitz James Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor.

Another consideration that has some weight in my mind bearing on the question of fact of want of actual negligence on the part of

the life tenant is this: These complainants named Colburn, remaindermen, filed a bill in this court October 16, 1897, in equity cause No. 18728, against the same defendants named in this case, for the substitution of a trustee, and in which bill they aver that said Taylor and Colburn were duly appointed trustees under said will by the probate court of Essex Co., N. J., and that much of the said estate had been wasted by said Taylor, "and that there was left *thereof* in the hands of the said George Fitz James Colburn, at the time of his death, the sum of $5,000," &c., but not making any claim that there was any other estate except the $5,000, or any right of action against said surviving trustee's estate for any sums wasted by Taylor.

While the trustee, when appointed, might not be estopped by this failure on the part of these beneficiaries to state all their claim against the defendants herein in their first bill, it seems to me it would have been more in accordance with the practice to have done so, and their failure to do so is a circumstance against them.

Without further comment by me as to the reasons of my conclusion, I will state that, in my judgment, the complainants have not made such a case on the facts as entitles them to relief in a court of equity, and the bill must be dismissed.

JOB BARNARD, *Justice.*

Decree Dismissing Bill.

Filed Nov. 3, 1899.

In the Supreme Court of the District of Columbia.

FRANKLIN E. MACKEY ET AL. *vs.* ROBERT E. GRANT, Executor. } Equity. No. 20130.

This cause coming on to be heard on pleadings, admission of facts, and having been argued by counsel for the respective parties and submitted to the court, it is this 3d day of November, A. D. 1899, adjudged, ordered, and decreed that the bill of complaint filed herein be, and the same hereby is, dismissed with costs; and the complainants, in open court, pray an appeal from this
18 decree to the Court of Appeals for the District of Columbia, which is granted, and appeal bond fixed at two hundred dollars.

JOB BARNARD, *Justice.*

Memorandum.

November 9, 1899.—Appeal bond filed.

Stipulation as to Transcript of Record on Appeal.

Filed Nov. 9, 1899.

In the Supreme Court of the District of Columbia.

ROLLINSON COLBURN ET AL. vs. ROBERT E. GRANT ET AL. } Equity. No. 20130, Doc. 46.

It is hereby stipulated and agreed that in the preparation of the transcript of the record on appeal the following papers only need be made part of the record in said transcript, to wit:

The amended bill.

The answer of the defendant Robert E. Grant, the others being immaterial to the determination of the issues herein raised.

The agreed statement of facts.

The will of Augustus G. P. Colburn, as it appears in eq. 18728.

The exhibits.

The opinion of the court.

The decree.

FRANKLIN H. MACKEY,
Solicitors for Complainants.
GORDON & GORDON,
Solicitors for Defendants, Robert E. Grant, Katie Grant, et als.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the above and foregoing pages, numbered from 1 to 32, inclusive, to be a true and correct transcript of the record, as per stipulation of counsel herein filed and made a part of this transcript, in cause No. 20130, equity, wherein Rollinson Colburn *et al.* are complainants and Robert E. Grant, executor, *et al.* are defendants, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

19 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 21st day of November, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 952. Rollinson Colburn *et al.*, appellants, *vs.* Robert E. Grant *et al.* Court of Appeals, District of Columbia. Filed Dec. 8, 1899. Robert Willett, clerk.

20 TUESDAY, *January 16th, A. D.* 1900.

ROLLINSON COLBURN, FRANKLIN H. MACKEY, Trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, Louise B. Colburn, an Infant, by Her Next Friend, Arthur R. Colburn, Appellants,

vs.

ROBERT E. GRANT, Executor; AUGUSTA F. COLBURN, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard.

No. 952.

The argument in the above-entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellants, and was continued by Mr. J. H. Gordon, attorney for the appellees, and was concluded by Mr. F. H. Mackey, attorney for the appellants.

21 ROLLINSON COLBURN and Others, Appellants,

vs.

ROBERT E. GRANT, Executor, and Others.

No. 952.

(Mr. Justice Morris delivered the opinion of the court.)

Opinion.

This case comes to us by appeal from a decree of the supreme court of the District, sitting in equity. It was heard in that court upon bill, answer, and an agreed statement of facts, which together constitute the record in the case. There is no controversy, therefore, as to the facts, at least as to the substantial facts, upon which a decision is sought. The controversy is as to the inference to be drawn from them. The facts are these:

On May 27, 1872, one Augustus G. P. Colburn died in Newark, in the State of New Jersey, leaving a will, executed two days before his death, whereby he devised to his son, George Fitz-James Colburn, who appears to have been his only surviving child, although this is merely matter of inference, for and during his natural life, a certain dwelling-house and lot in the city of Newark, with power to the trustees named in the will, who were his said son, George Fitz-James Colburn, and John W. Taylor, Esquire, a prominent lawyer of Newark, to sell the same at any time, and the proceeds of sale to invest as advantageously as practicable, and the income thereof to pay over to the said son, George Fitz-James Colburn, during
22 his lifetime. The will further provided that upon the son's death the property should go to his wife, if she survived him, for the time of her widowhood; and upon the death of both, to the son's issue in fee-simple, if any issue he should leave, and upon the death of the son without leaving issue, which was the contingency that happened, the income of the property or of its proceeds should be paid at stated and convenient times to the brothers and sisters of the testator, and the survivors and survivor of them, in equal shares, and upon the death of all of his brothers and sisters, the principal sum was to vest absolutely in the children of one brother,

Hervey Colburn. The said George Fitz-James Colburn was made residuary devisee and legatee of the estate, and this son and John W. Taylor were appointed executors of the will.

Shortly after the death of the testator the real estate mentioned was sold by the executors or trustees under the will, and realized the net sum of twenty-seven thousand dollars, part of which was paid in cash and the remainder in instalments, which were collected by the trustee Taylor in course of time. Of the proceeds of sale the sum of five thousand dollars came into the hands of George Fitz-James Colburn and remained intact with him until his death. He removed, in the year 1873, which was the year immediately following his father's death, from Newark to this city of Washington, and died here, a widower and without issue, in September, 1897. The remainder of the proceeds of sale, amounting to twenty-two thousand dollars,
23 came under the exclusive management and control of the other trustee, John W. Taylor, who, as already stated, was a prominent lawyer in Newark, and was regarded by the general public as a man of business integrity, and as such seems to have had many estates committed to his care. At his death, however, which occurred by his own hand, on November 20, 1893, it was found that he had squandered all these estates, and among them the portion of the estate of Augustus G. P. Colburn which had been permitted to remain in his hands. Excepting the sum of five thousand dollars, which has been mentioned as having been taken charge of by George Fitz-James Colburn himself, the latter left the whole estate, consisting of the sum of twenty-two thousand dollars, as stated, "to the collection, management, and discretion of the said Taylor, who handled the same without the co-operation, supervision, or knowledge of the said George Fitz-James Colburn, the latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz-James Colburn, as provided by said will."

Upon the death of Taylor, George Fitz-James Colburn, as surviving trustee, made claim against Taylor's estate for the amount of the trust fund squandered by him, and upon his claim for twenty-two thousand dollars he received a dividend of three thousand three hundred and forty-two dollars and forty-five cents ($3,342.45). It seems to be understood that nothing further is to be had from that source. To the amount so recovered the children of Her-
24 vey Colburn, who had then become entitled to the reversion to it, released all claim in September, 1895, and with it George Fitz-James Colburn purchased an annuity, which he enjoyed until his death, two years afterwards.

A fact deemed of some importance by counsel on both sides is that the trustees under the will of Augustus G. P. Colburn acted without bond. The will is silent on that subject, but the fact is stated in the agreed statement.

Upon the death of George Fitz-James Colburn in 1897 he left a will whereby the defendant Robert E. Grant was appointed his executor, and disposition was made of his estate, which consisted entirely of personalty. In his estate was found the sum of five thou-

sand dollars of the estate of his father, which has been mentioned, and which sum was turned over by the executor Grant to the trustee substituted in the place of George Fitz-James Colburn and John W. Taylor for the estate of Augustus G. P. Colburn upon proceedings instituted for the purpose in the supreme court of the District of Columbia, in which proceedings all the parties to this suit were parties, except the said trustee who was therein appointed. Why such trustee was appointed is not quite apparent, since no trust seems to have remained to be performed under the will of Augustus G. P. Colburn, but this is probably unimportant.

As already stated, George Fitz-James Colburn survived his wife and died without having remarried and without issue. He survived also all the brothers and sisters of Augustus G. P. Colburn except one, and that one died three months after him. Thereupon
25 the interest in this devise or bequest under the will of Augustus G. P. Colburn became vested in the children of the latter's brother, Hervey Colburn, and these, joining with the trustee, appointed as above stated, instituted this suit against the executor and the estate of George Fitz-James Colburn to enforce against it the liability claimed to have been incurred by George Fitz-James Colburn as cotrustee by reason of the defalcation of John W. Taylor.

Most of the facts here stated appear in the bill and answer filed in the case, and are made definite by the agreed statement of facts. In the answer, however, it is further stated, although the statement is claimed not to be responsive to anything in the bill of complaint, that the management and control of the trust fund of twenty-two thousand dollars of the estate of Augustus G. P. Colburn was left with John W. Taylor, "with the full knowledge of the parties in interest and without opposition on their part;" that Taylor "had continued to remit regularly from 1873 to 1893 to said George Fitz-James Colburn the income from said sum of twenty-two thousand dollars under his control, and no reason for doubting his honesty or integrity or as to the proper management of the estate in his possession had ever arisen." And it appears that the estate, or the investment of it, was in the city of Newark, where Taylor resided and was a prominent lawyer held in high esteem, while George Fitz-James Colburn resided in the District of Columbia. It is further stated in the answer that never during the lifetime of George Fitz-
26 James Colburn did the children of Hervey Colburn, who were all of full age, make any pretence of holding George Fitz-James Colburn liable for the defalcation of his cotrustee; that, on the contrary, the only concern which they exhibited in the matter was that said George Fitz-James Colburn would lose the income which he had previously enjoyed; that it was in order to provide for such loss of income as far as possible that they relinquished all claim to the sum which he had recovered from Taylor's estate, and that the idea of claiming any liability on the part of George Fitz-James Colburn or his estate for the defalcation of Taylor was an afterthought, resulting since the death of Colburn from his failure to leave his small estate to the complainants in the cause.

Upon the bill, answer, and the agreed statement of facts the

supreme court of the District dismissed the bill, and from the decree of dismissal the present appeal has been prosecuted.

The question in the case is, whether, under the circumstances stated, a trustee can be held liable for the malfeasance of his co-trustee.

The principles of law applicable to the case are simple enough and well settled, and there is no real controversy between the parties in regard to them. The controversy is rather one of fact than of law, or rather it is whether an inference of negligence can be drawn from a certain conceded state of facts.

The law as to the duties and liabilities of cotrustees seems
27 to be well and fully stated by the chancellor of Maryland in the case of Latrobe *vs.* Tiernan, 2 Md. Chan. Rep., 474, 480, in which it is said:

"The general doctrine does not appear to admit of dispute that trustees have all equal power, interest, and authority, and cannot act separately, as executors may, but must join both in conveyances and receipts, for one trustee cannot sell without the other or make a claim to receive more of the consideration money. 'As a general rule,' says Hill on Trustees, 305, 'trustees cannot act separately, but they must all join in any sale, lease, or other disposition of the trust property, and also in receipts for money payable to them in respect of their office;' and the cases, so far as I have been referred to them, are uniform in maintaining this as a general rule. They are referred to in the passage quoted from Hill and in 2d Story's Equity, section 1280, in the notes. As trustees, then, are in general required to join in receipts of money and conveyances or other dispositions of the trust estate, they are only responsible for their own acts and not for the acts of each other, unless they have made some agreement by which they have engaged to be bound for each other, or they have, by their own voluntary co-operation or connivance, enabled some one or more of them to violate the trust."

In the American and English Encyclopedia of Law, 1st ed., vol. 27, art. Trusts and Trustees, the law is thus summed up from a consideration of all the authorities:

28 "The duties and liabilities of cotrustees are joint and not individual. Cotrustees may not act independently of one another nor ignore each other in the management of the estate. The trust is entitled to the benefit of the united judgment, discretion, and ability of all the trustees selected. For this reason they may not delegate discretionary power among themselves, nor escape responsibility for the safe exercise of the entire trust by distributing the duties among themselves and dividing its responsibilities. With ministerial duties the rule is different. The transaction of the ordinary business of the trust, which involves no special personal fitness in the one who must conduct it, and calls for the exercise of no particular degree of judgment or discretion upon his part, may legally be deputed to one of a number of trustees by the others, and they will be liable for losses only where they have been guilty of negligence in connection with such delegation of power. If trustees may delegate such powers to agents and employees there

can be no reason to forbid them from delegating the performance of like duties to certain of their own number.

A cotrustee cannot be held responsible for loss or injury to the estate occurring through the fault of a cotrustee if he himself has been blameless."

From the agreed statement of facts in this case it appears that the trust estate of Augustus G. P. Colburn, as to the sum of twenty-two thousand dollars of it, "was by the said George Fitz-
29 James Colburn left solely to the collection, management, and discretion of the said Taylor, who handled said sum without the co-operation, supervision, or knowledge of the said George Fitz-James Colburn, the latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz-James Colburn, as provided by said will;" and it is upon this statement that it is contended on behalf of the appellants that George Fitz-James Colburn improperly abandoned to his cotrustee the discretionary management of the estate vested in both of them jointly, and thereby rendered himself liable to the appellants for the malfeasance of Taylor.

But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz-James Colburn or any proof of negligence on his part in the supervision of the trust in such manner as to render himself or his estate liable.

It is true that it is said in the statement that the trust estate, to the extent of twenty-two thousand dollars, was left by Colburn to "the collection, management, and discretion solely of Taylor," and that Taylor "handled said sum without the co-operation, supervision, or knowledge of Colburn." But this is not sufficient. The statement may be consistent with the relinquishment only by Colburn of the ministerial duties which he might well have intrusted to Taylor. In order to hold Colburn responsible there should be some evidence of abandonment by him of the discretionary duties which it was not proper for him to delegate to his cotrustee.

30 It is very evident that the testator had confidence in Taylor, whom he designates as his friend, and who was in all probability his legal adviser; and the joinder of Taylor in the trust is, under the circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think that it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject

to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise? It does not anywhere in the record appear how this fund of twenty-two thousand dollars, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having
31 been once invested, there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold; and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed. At all events, we cannot assume the contrary in the absence of proof. We cannot assume that the money became due, and that Taylor received it and reinvested it without the concurrence of Colburn, or that he wholly failed to reinvest it and converted it to his own use. That Taylor obtained control of the fund and misappropriated it is very clear; but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misappropriation may have been an afterthought. We cannot infer delinquency on the part of Colburn when there is no more proof than is contained in this record that, by his abandonment of his trust or by his negligence in the supervision of it, he had put it in the power of his cotrustee to prove faithless in his duty. Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment nor negligence is to
32 be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the inference, and we do not find that proof in the statement of facts contained in this record.

We are of opinion that the conclusion reached by the learned justice who heard this cause in the supreme court of the District was right, and that the decree of that court should be affirmed, with costs.

And it is so ordered.

33 WEDNESDAY, *February 7th, A. D.* 1900.

ROLLINSON COLBURN, FRANKLIN H. Mackey, Trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, Louise B. Colburn, an Infant, by Her Next Friend, Arthur R. Colburn, Appellants,
vs.
ROBERT E. GRANT, Executor; Augusta F. Colburn, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard.
} No. 952. January Term, 1900.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed, with costs.

Per MR. JUSTICE MORRIS.

February 7, 1900.

34 TUESDAY, *February 15th, A. D.* 1900.

ROLLINSON COLBURN, FRANKLIN H. MACKEY, Trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, Louise B. Colburn, an Infant, by Her Next Friend, Arthur R. Colburn, Appellants,
vs.
ROBERT E. GRANT, Executor; AUGUSTA F. COLBURN, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard.
} No. 952.

On motion of Mr. F. H. Mackey, attorney for the appellants in the above-entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States on giving bond for costs in the sum of three hundred dollars.

35 Know all men by these presents that we, Franklin H. Mackey, as principal, and Horace S. Cummings, as surety, are held and firmly bound unto Robert E. Grant, executor; Augusta F. Colburn, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard, the said parties being hereinafter called appellees, in the full and just sum of three hundred ($300.00) dol-

lars, to be paid to the said appellees, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of February, in the year of our Lord one thousand nine hundred.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Rollinson Colburn, Franklin H. Mackey, trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, and Louise B. Colburn, the said parties being hereinafter called appellants, a decree was rendered against the said appellants, and the said appellants have taken and been allowed an appeal in open court to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANKLIN H. MACKEY. [SEAL.]
HORACE S. CUMMINGS. [SEAL.]

Sealed and delivered in the presence of—
ROZIER C. BOWMAN.

Approved by—
M. F. MORRIS, *Associate Justice.*

This bond is satisf[illegible].

GORDON & GORDON,
Sol'rs for Appellees.

[Endorsed:] No. 952. Rollinson Colburn *et al. vs.* Robert E. Grant, exec'r, *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Feb. 27, 1900. Robert Willett, clerk.

36 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 35, inclusive, contain a true and correct transcript of the record and proceedings of said Court of Appeals in thec ase of Rollinson Colburn, Franklin H. Mackey, trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn, Louise B. Colburn, an infant, by her next friend, Arthur R. Colburn, appellants, *vs.* Robert E. Grant, executor; Augusta F. Colburn, Katie Grant, Annie Burke, Martha Hamblin, and Martha Fitz James Scales Leonard, No. 952, January term, 1900, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 1st day of March, A. D. 1900.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,668. District of Columbia Court of Appeals. Term No., 221. Rollinson Colburn, Franklin H. Mackey, trustee; Edward A. Colburn, Elizabeth F. Colburn, Gertrude H. Colburn, Louise B. Colburn, an infant, by her next friend, Arthur R. Colburn, appellants, *vs.* Robert E. Grant, executor; Augusta F. Colburn, Katie Grant, Annie Burke, Martha Hamblin, & Martha Fitz James Scales Leonard. Filed March 9th, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN ET AL., APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR, ET AL., APPELLEES.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief for Appellants (Complainants Below).

STATEMENT OF FACTS.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the supreme court of said District which dismissed the bill in equity filed by appellants for an account.

The bill was filed by the legatees of Augustus G. P. Colburn and their trustee, Franklin H. Mackey, against the executor of the estate of George Fitz James Colburn, a deceased trustee of the estate of said Augustus Colburn, for an accounting, it being alleged that there had come into the

hands of said trustee and his cotrustee, both of whom were deceased, a large sum of money, viz., $28,000, and that only $5,000 thereof had been accounted for. The codefendants of the defendant executor are those persons who would be entitled to distribution of his testator's estate. Answers were filed denying liability to account, and thereafter the case was heard upon the pleadings and an agreed statement of facts. The complainant claimed that defendant's testator had been negligent in the administration of the trust, and that his estate was liable to make good the deficiency. The court dismissed the bill, and on appeal the decree of dismissal was affirmed.

From the admitted allegations of the bill and the "Agreed Statement" the following facts are conceded and make up the case upon which the decision of the court is asked:

That on the 27th day of May, 1872, Augustus G. P. Colburn, of the city of Newark, New Jersey, departed this life in said city, leaving his last will and testament, dated May 25, 1872, whereby he devised to his son, George Fitz James Colburn, for and during his natural life, a certain dwelling-house and lot in said city, with power to the trustees named in the will, to wit, his said son, George Fitz James Colburn, and John W. Taylor, to sell the same, and the proceeds to invest and the interest to pay to said George Fitz James Colburn during his lifetime; that in case of the death of his said son without issue the income should be paid to his widow if she survived him, and after her death to the brothers and sisters of said Augustus G. P. Colburn for and during their natural lives, and in case of the death of any of them after his decease, then such income was to be paid to the survivors of said brothers and sisters equally, and upon the death of all of his said brothers and sisters the principal so invested was to go to and vest in the children of his brother, Hervey Colburn. An exemplified copy of the will is made part of the bill, marked Exhibit A. (See printed Record, p. 5.)

That said George Fitz James Colburn died on the 21st day of September, 1897, in the city of Washington, D. C., unmarried and without issue, his wife having predeceased him; that all the brothers and sisters of said Augustus are dead, having predeceased George Fitz James Colburn, except Miranda Kimball (sister of Augustus), who died about three months after said George Fitz James Colburn; that the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of said Hervey Colburn, brother of the testator.

That said Taylor (one of the trustees under the will of Augustus Colburn) died in the year 1893, and that said George Fitz James Colburn died testate on the 21st day of September, 1897, leaving the defendant Robert E. Grant as his executor, who has duly qualified.

That the trustees, Colburn and Taylor, were named as trustees of the will for the management of the trust, and that they gave no bond for the faithful performance of the trust; that the real estate was shortly after the testator's death sold by them for $27,000, which was paid, part in cash and the remainder in subsequent installments, which were collected by Taylor; that George Fitz James Colburn moved from Newark in 1873 to the city of Washington, D. C., where he resided, except for a few months, up to the day of his death.

That Taylor "was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death, in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death, by his own hand, on the 20th of November, 1893."

"That after the death of Taylor it was found that he had squandered many estates under his custody, amongst others, the said estate of Augustus G. P. Colburn, except the sum of $5,000, which was under the exclusive control of the said George Fitz James Colburn, and which latter sum of $5,000

has been turned over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18728.*

"That the said trust estate, except the said sum of $5,000 referred to, was by the said George Fitz James Colburn *left solely to the collection, management and discretion of the* said Taylor, who handled said sum, *without the co-operation, supervision or knowledge* of the said George Fitz James Colburn, the latter only requiring from said Taylor *the payment of the income* of said estate to him said George Fitz James Colburn as provided by the will."

It is also conceded that, after the death of Taylor, George Fitz James Colburn, as surviving trustee, "made claim against the estate of said Taylor for $22,000, the amount of the trust fund by him squandered, as aforesaid, and upon said claim a dividend of $3,342.42 was paid, and that by a paper-writing this sum was released by the plaintiffs, ex-

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* The following is a copy of the decree appointing the trustee in equity cause 18728, it having been omitted by inadvertence from the transcript of the record, but read by consent of counsel in the Court of Appeals:

Copy of Decree Appointing Franklin H. Mackey Trustee.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

ROLLINSON COLBURN ET AL. vs. ROBERT E. GRANT ET AL. } In Equity. No. 18728.

This cause coming on to be heard upon the pleadings, exhibits, and stipulation as to evidence, and having been argued by counsel for the respective parties, and it appearing to the court that the trustees under the will of Augustus G. P. Colburn are both deceased—

It is by the court, this 15th day of December, A. D. 1898, adjudged, ordered, and decreed that Franklin H. Mackey, Esq., be, and he hereby is, appointed trustee under the said will, with all the power and authority by said will heretofore vested in said deceased trustees, upon condition, however, that before undertaking the performance of said trusts he file in this court a bond, with surety to be approved by the court, in the sum of ten thousand dollars, conditioned upon the faithful performance of said trusts.

(Signed) W. J. COX, *J.*

M. 53, p. 467.

cept Miranda Kimball, to said George Fitz James Colburn to enable him to purchase an annuity for himself, which he did, and enjoyed it until his death."

The prayers of the bill are for an accounting and for a decree "against the said Grant as executor of said estate of George Fitz James Colburn * * * for so much of the estate of the said George Fitz James Colburn * * * as may be justly payable to complainants or any of them by reason of his, the said George Fitz James Colburn's, liability incurred as trustee of the estate of Augustus G. P. Colburn aforesaid."

As stated, the bill was dismissed and the case is now here on the following

ASSIGNMENT OF ERRORS.

1st. That the court below erred in dismissing the bill.

2d. That it erred in refusing to grant the prayers of the bill.

3d. That it erred in finding as matter of law that the estate of George Fitz James Colburn was not liable for the deficiency in the estate of Augustus Colburn.

4th. That it erred in finding as matter of law that said Colburn was not guilty of any such negligence or default in his administration of the trust estate as would render him liable *de bonis propriis.*

BRIEF OF ARGUMENT.

For the express purpose of presenting the evidence clearly and well defined, the parties to this cause, through their counsel, agreed upon a "Statement of Facts," and one of the first things of which we have to complain is of the action of the court below in going beyond that agreed statement to

find other supposed facts in the answer of the defendant executor. His answer was called for without oath, the oath being expressly waived, and consequently could not be evidence except in so far as it admitted the allegations of the bill or contained admissions against interest. Had we known that the court would have regarded the allegations of this answer as evidence, notwithstanding the stipulation of counsel, we would have had the right to rebut these allegations by other evidence; but, relying, as we had the right to do, upon the well-known rule that, where parties have stipulated what the evidence is, the court will confine itself to the facts contained in the stipulation and the admissions of the parties in their pleadings, we took no other testimony. Now, if a court may ignore the stipulation and bring into the case other alleged facts, which by reason of the stipulation we did not deem it necessary to rebut, it is plain that the plaintiffs are *entrapped* by the court into a position which neither of the parties to the controversy contemplated. Such procedure is equivalent to deciding the case upon *ex parte* testimony, and no greater injustice could be done than that.

Believing that this supreme tribunal will, in making up its judgment, confine itself to the "Statement of Facts," supplemented with such allegations of the bill as are admitted by the answer, and also such admissions in the answer as are against interest, we proceed to consider the case from the plaintiff's standpoint.

We quite agree with the court below in its statement that "the principles of law [governing this case] are simple enough." But we deny the correctness of its statement that "the controversy is one of fact," for there is no such controversy. There are no disputed facts before the court whatever. Every fact upon which the court is to apply the law is conceded by the "Statement of Facts" or the admissions of the parties.

These facts so conceded are:

1. That Augustus G. P. Colburn died in Newark, in the State of New Jersey, May 27, 1872, leaving the will set forth in the record (p. 5).

2. That the parties in interest are as stated in the agreed statement and the bill.

3. That Taylor and George Fitz James Colburn were appointed trustees of the property devised by the will, and that neither gave any bond.

4. That the dwelling-house referred to in the eight paragraphs, respectively, of the bill and answer was sold by the trustees for $27,000 shortly after the death of the testator.

5. That the net proceeds of said sale "was paid part in cash and the remainder in subsequent installments, the latter installments being collected by the said Taylor" (Rec., p. 11).

6. That, of this sum, $5,000 was placed under the "exclusive control of the said George Fitz James Colburn" (Rec., p. 11).

7. That the said trust estate, except the said sum of $5,000 referred to, was by the said George Fitz James Colburn left *solely to the collection, management, and discretion* of the said Taylor, who handled said sum without the co-operation, supervision, or knowledge of the said George Fitz James Colburn, the latter *only requiring* from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

8. That George Fitz James Colburn removed from said city to Washington, D. C., in 1873, where he resided, except for a few months, up to the day of his death.

9. That Taylor continued to reside in Newark, was a prominent lawyer there at the time of his appointment as trustee, and continued so to be up to the date of his death, and that "he was regarded by the general public as a man of business integrity at the time of his death by his own hands on the 20th of November, 1893."

Note, from the fact that he was a "*prominent lawyer* and regarded by the general public as a man of *business integrity*," the court below states that he was "held in high esteem," a fact that was not admitted, and that the Agreed Statement scarcely justifies, since men may be believed to possess "business integrity" and yet not be held "in high esteem." The only argument that can be drawn from this finding is that it is a supposed justification of Colburn in abandoning the trust to Taylor's discretion, but, we submit, it affords no such justification.

10. That on the death of Taylor it was found that he had squandered many estates in his custody, including the estate of Augustus Colburn.

11. That a dividend of $3,342.45 upon his claim of $22,000 against the estate of Taylor was paid to Colburn, the surviving trustee, which sum he was permitted by the parties in interest to invest in the purchase of an annuity.

12. That George Fitz James Colburn died in Washington in September, 1897, and that only the sum of $5,000 of the estate of Augustus Colburn has been turned over by his executor to the new trustee, Franklin H. Mackey.

The foregoing are, as we have said, the material and conceded facts of the case. The *law* raised by them being, as the court below said, "simple enough," must therefore also be conceded, and it is, to formulate it briefly, as follows:

A trustee is personally liable who, retaining his position as trustee, turns over the greater part of the proceeds of sale

of the trust property to his unbonded cotrustee, who squanders it when it appears that for nearly twenty years the negligent trustee left the money to the sole handling, management and discretion of the defaulting trustee, neither co-operating with him nor supervising in any manner his dealings therewith.

It is the duty of a cotrustee, who desires to retire from any participation in the management, control of and supervision over a trust fund (neither of the two trustees being bonded) to tender his resignation to the court in order that a new trustee may be appointed in his stead, or that security may if necessary be required of the remaining trustee, the necessity for a bond being greater where there is only *one* trustee than where there are two or more.

These two propositions of the law of trusts are abundantly sustained by the authorities. Indeed, the court below cites with approval practically the same propositions, in the following language, on page 22 of the record:

"Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, *discretion* and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."

Then, as to the establishment of the fact of the abandonment of discretionary power over the trust by one of the trustees to his cotrustee, the court says on page 24 of the record:

"Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of the trust."

We find no fault with the proposition as to the burden of proof, but we submit that when it is stipulated as matter of fact between the parties that the trustee sought to be charged "left" the entire estate "solely to the collection, management, and *discretion*" of the cotrustee we have discharged our-

selves of the duty of offering any other proof of "abandonment of discretionary power by the trustee to his cotrustee,' and especially so when we follow up this by pointing to the conceded fact that the negligent trustee permitted the defaulting trustee to "handle" the fund "without the co-operation, supervision, or knowledge" of the negligent trustee, who "only required" the defaulting trustee to pay him the income of the estate, he being the life tenant, thereby showing that where his own interests were concerned he was diligent, but with the interests of those who were to enjoy the estate after his death he did not concern himself—*apres moi le deluge.*

What stronger proof could we offer than the admissions of the defendant? By those admissions we show that the negligent trustee, from 1873 to 1893, a period of twenty years, left the fund "solely," viz., entirely, to the "discretion" of his cotrustee, entirely to his "management" and to his "handling"—gave him no "co-operation," no "supervision," and sought no "knowledge" of the fund nor of his cotrustee. If this is not "abandonment" of a trust, we should like to know what it is. And yet in the face of these damning admissions the court below says, "We cannot infer delinquency on the part of Colburn when there was no more proof than is contained in the record, that by his abandonment or by his negligence in the supervision of it *he had put it in the power of his cotrustee to prove faithless in his duty!* If leaving to an unbonded cotrustee the entire and sole discretion, management, supervision, handling and knowledge of the fund without the co-operation of the negligent trustee for a period of twenty years is not "putting it in the power of the unbonded cotrustee to prove faithless to his duty," we should like to know what conduct short of criminal connivance is necessary on the part of a cotrustee in order to hold him liable for negligence in such a case.

In summing up the conclusions of the court the learned justice, delivering the opinion, says:

"If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed upon the trustee, Taylor, other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise?"

The answer to this question would seem very plain. In the first place, *before* the real estate was sold Colburn could very well have left the mere collecting of the rents and payment of the taxes to Taylor. There was in that no danger of the *corpus* being lost. Taylor could not dispose of real estate without Colburn's signature to the deed, and therefore the remaindermen were perfectly safe, no matter how far away or how negligent in surrendering to Taylor the management of the *income* of the trust estate Colburn may have been. But when he joined with Taylor in the sale of the *corpus* a different situation at once arose. The *corpus* took on a different form. It had changed from real estate to *money* and this money Taylor, if faithless to his trust, could at any time have appropriated to his own use unless watched by Colburn. It was this money which Colburn, according to the Agreed Statement of Facts, "left *solely* to the collection, handling, management, and discretion," for twenty years, of a co-trustee, who had given, as Colburn well knew, no bond as security for its forthcoming when wanted. The defendant admits that his testator not only did this, but permitted Taylor "to handle said sum [money] without his co-operation, supervision, or knowledge," his only requirement being that Taylor should pay him the interest thereon, but leaving

the investment of it, if it ever was invested, to Taylor's "discretion."

Again the learned justice speaks of the real estate being sold "and the proceeds invested and reinvested," and a little lower down on the same page (24) he says:

"It does not anywhere appear that after having been once invested there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold, and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed."

Surely this conceded "conjecture" and "assumption" could hardly be more at variance with the stipulated and admitted facts. By turning to that stipulation, on pages 10–11 of the record, we find that so far from its justifying the assumption that "the amount [viz., the purchase price] remained as a mortgage upon the property." The purchase price "was paid part in cash and the remainder in subsequent installments, the latter installments being collected by Taylor."

"It does not anywhere appear," says the court, "that after having been once invested there ever was need or occasion for reinvestment." "But," we ask in turn, "where does it anywhere appear that it ever was even *once* invested"? *Quod non apparentibus et non existentibus eadem est ratio.* We are far more justified in "conjecturing" or "assuming" that after it got into Taylor's hands it was never invested. Indeed the very admission of the stipulation is that it was "squandered," together with other funds in his hands. A man does not "invest" what he "squanders," and does not squander what he invests. All this "squandering" arose from Colburn's abandonment of the fund to Taylor. As Colburn knew that Taylor was not under bond, and knew that having left the money *solely* to the latter's *handling, manage-*

ment and *discretion*, without any *co-operation* or *supervision* on Colburn's part, he could not but have known that he had placed it in Taylor's power to prove faithless to his trust. What more could he have done to make it easier for Taylor to "squander" the fund without his, Colburn's, knowledge?

When a trustee is shown to have thus abandoned the trust to his cotrustee for nearly twenty years, is not the burden of proof at once shifted to him, or to those who seek to discharge his estate from the consequences of his conduct, of showing some excuse for such conduct? Does the fact that Taylor's reputation with the "general public" was that of a man of "business integrity" justify an abandonment of the trust fund to him? Nowhere is it shown that Taylor was a man of financial responsibility; and, if it were so shown, that fact would constitute no justification; nor is it shown that Colburn was a man of no experience, or that he was in ill health, or that any matter or thing required or compelled him to thus completely give up the trust to Taylor's keeping and discretion. The learned justice delivering the opinion of the court quotes from 2d Story's Equity, section 1280, that "trustees are only responsible for their own acts and not for the acts of each other, *unless* they have made some agreement by which they have engaged to be bound for each other, or they have *by their own voluntary co-operation or connivance enabled some one or more of them to violate the trust.*"

There is no dispute about this as the law. This trust was in the form of real estate when the trust was created. Did not Colburn, by co-operating with Taylor in turning it into money, and then turning over the money to Taylor to "handle," without security or supervision, leaving it "solely" to his "management and discretion" for nearly twenty years, to do with as he pleased, "enable him to violate the trust"?—a thing which Taylor was unable to do so long as the *corpus* stood in the form of realty.

II.

But it is claimed that these contingent remaindermen, some of whom were children at the time and some yet so as the record shows, and, as the record also shows residing, one in Pennsylvania, one in the District of Columbia, one in Massachusetts, and one in New York, had—thus scattered over the country as they were—imposed on them the duty to watch Taylor. It was their duty, we are told, to know what he was doing, and therefore they cannot complain of their trustees' negligence, or of the negligence of the cotrustee. Surely this is not the law, and it needs no argument to refute it. It is doubtful whether as contingent remaindermen they would have had the right to interfere, even had they known the facts; but, whether that be so or not, the testator had placed these interests in charge of two trustees, and surely neither of them can escape the consequences of their negligence or default by saying that the contingent remaindermen should have watched them and complained sooner, especially when they do not appear to have had any knowledge of the facts, being widely separated from the trustees and from each other. This trust existed for nearly a quarter of a century before the event happened, upon the happening of which the contingent remaindermen were to enjoy it. It was an event that in the nature of things would not be likely to happen until many years had elapsed, and it was an event which might never have happened; and yet these widely separated parties, some of whom were not born when the trust property was sold, are to go without remedy because their trustee silently and voluntarily abandoned the trust which it was his duty to watch over.

III.

There remains but one other point to be noticed. It is claimed by the defense that because some of these contingent remaindermen signed a paper called in the record "a release" of all claims to the sum of $3,342.45 "received by him (Colburn) from his father's estate," therefore they have acquitted the releasee of all further demands. That is to say, if A owes B two dollars, and B releases his claim for one of the dollars, he thereby loses the right to demand the other dollar. An examination of the language of the paper itself will show the absurdity of such a pretension. There was no consideration whatever for its execution. It was a pure gift and could not even today be legally enforced, were the money in existence to be claimed. It is only because of the fact that it was paid over to third parties in consideration of an annuity on the belief that such a paper authorized such use of it, that the signers of the paper are estopped from now claiming that the testator's estate should account for it.

IV.

WHAT THE AUTHORITIES SAY.

"All the trustees must act in dealing with the management of the principal or capital of the trust" (Perry on Trusts, § 416, and cases cited). *Prima facie*, they are responsible and liable therefor (*ibid*). It is recognized that it is practically impossible for every trustee of several to actually attend every detail of administration, as where a business is being carried on, or a bond is to be collected by one trustee, or money is put into the hands of one to be paid away; or where a fund was given to three trustees, one in London and two in Cornwall, to build an alms-house in London, it was held that the fund was properly in the hands of the trustee in London, and that during the construction of the alms-house the others were not answerable for the loss of part of it by his insolvency (Perry Tr., § 417, and cases

cited). Here there were reasonable excuses for the innocent trustees, and no negligence was imputed to them.

"But a trustee is not excusable for not exercising a general superintendence and care over the trust (Perry on Tr., cited).

"Even a direct provision in the deed of settlement that trustees shall not be liable for the defaults of their cotrustees does not excuse them from this general care and superintendence and from 'the duty of intervening, if they hear any fact tending to call for their intervention; nor will it justify them in paying over the money to the sole credit of one trustee, and generally it will not authorize them to do any acts which would be a breach of trust if such clause was not in the deed or will (Perry on Tr., § 417, and cases cited).

"So if the will contemplates the joint action and joint liability of all, they cannot excuse themselves if they accept the trust (Perry on Tr., § 417, and cases cited).

"A trustee is guilty of a breach of trust if he does not exercise due care and diligence (Perry on Tr., § 418).

"Thus, for example, if he suffers money to remain in the hands of his cotrustee, however competent and responsible, longer than is necessary (*ibid.*, Brice *vs.* Stokes, 11 Ves., 319, &c., &c.).

"So, trustees must ascertain the condition of the funds at all times within which a reasonable man should ascertain the condition of his own property; as where a mortgage to three trustees had been paid off, and the money came to the hands of one, and was invested in bills and notes of the East India Co., payable in two years, and these were paid into the hands of the same trustee to whom the mortgage had been paid, and the acting trustee asked to have the money remain in his hands on a mortgage to be given; and it so remained for a year, no mortgage being executed, the other trustees taking no active steps for several years to know the actual condition of the trust fund; this was held to be a breach of trust, and they were decreed to make good the loss" (Perry Tr., § 418, and cases cited).

"A trustee is bound to inquire and ascertain for what purpose a cotrustee desires the money; what investments he proposes to make, and what securities he proposes to take, and he must take pains to see that the proposed investments are actually made (Perry Tr., § 418, note and cases cited).

"There is an actual or constructive breach of trust if a trustee acquiesces in his cotrustee's retaining the money in his hands unnecessarily (Perry Tr., § 419, note 4 on page 506, citing 4 Beas., 427, &c.).

"If a trustee receives the trust fund or part of it, and pays it over to his cotrustee, who wastes it, he will be liable for it (Perry Tr., § 419, p. 507, note 7), or if he is guilty of any negligence or want of reasonable care" (*id.*, note 8).

In the case at bar both trustees joined in the execution of the power of sale, each receiving part of the trust funds, by mutual consent. There is no question of either joining for *conformity;* this division of the trust fund was unlawful, especially as neither looked one to the other's acts of administration, and thus each became liable for the other's default, if any; for this mutual agreement amounted to the same thing as each receiving a portion of the trust and paying it over to the other's exclusive control.

It is held that if trustees join in executing a power of sale, and one receives the money, all must be held answerable if it is lost by the one that receives it (Perry Tr., § 420, p. 508, and cases cited in note 1).

In the case of *executors*, all who join are held responsible (Perry Tr., § 421, and cases cited). So if an executor joins in executing a power of sale (as in the case at bar) given in the will he will be responsible for the appropriation of the proceeds, though his co-executor receives all the money (Perry Tr., § 421, and cases cited).

An executor is responsible for knowing how the funds in the hands of his coexecutor are disposed of. (Perry Tr., § 423, and cases cited.)

If there are several trustees they must act jointly (Martindale on Conveyancing, § 317).

A trustee is prohibited from leaving the control of his trust estate to his cotrustee (Adams Equity [58]). For when several trustees are appointed the property is committed to the charge of all, and the *cestui que trust* is entitled to the vigilance of all (Adams Eq. [58]; Snell Eq., 147, pt. 2, ch. 6).

Cotrustees are bound to know the receipts and watch over the conduct of each other (Ringgold *vs.* Ringgold, 1 Har. & Gil., 11).

In matters requiring the exercise of discretion by trustees and not in mere ministerial acts, cotrustees must all join and cannot act separately in discharge of their trust (Vandever's Appeal, 8 W. & S., 405).

Similarly it is held that it is not sufficient, to exempt one of the two joint trustees from liability, that the duties of the trust have been exclusively performed by the cotrustee, with the concurrence and consent of the former. On the contrary, he is responsible for the conduct and management of his cotrustee to whom he has thought proper to delegate his power, in the same manner and to the same extent as if they had been executed by himself.

Maccubbin *vs.* Cromwell, 7 Gill & J., 157.
Spencer *vs.* Spencer, 11 Paige, 299.

So when, by the act of one trustee, a portion of the trust fund gets into the hands of his cotrustee, they are both responsible therefor (Graham *vs.* Davidson, 2 Dev. & Bat. ch. 155).

In a mere ministerial act, such as the receipt of moneys during the administration of the trust, an act not involving nor calling for the discretion of the trustees, one trustee may properly allow his cotrustee to receive the same, but he will be liable if he improperly allows it to stay in his hands. (See Adams Eq. [58].)

Even innocent trustees can be held for a default of a cotrustee, where the cotrustee cannot be reached by reason of insolvency or the like. (See Adams Eq. [59], note.)

"Trustees cannot delegate this authority. The office of a trustee is one of personal confidence, and cannot be delegated. A trustee, therefore, unless expressly authorized by the instrument of trust, cannot delegate or transfer, or intrust, in whole or in part, his powers of discretion and

management to any associate, subordinate, or assistant who takes his place and assumes his responsibility. If he does so he remains liable to the beneficiary, and is chargeable for all acts and omissions of his delegate, and with all losses, whether occasioned by the latter's fraud, neglect, want of good faith, or other cause" (Pomeroy's Eq. Jur., § 1068, and cases cited).

"As a trustee cannot delegate his authority to a subordinate, so on the same principle *he cannot idly yield or surrender the entire control of the trust property and exercise of the trust functions to his cotrustees, when he is associated in the trust with others,* * * * the beneficiary is entitled to that security and protection which results from the care, oversight, and co-operation of all the trustees."

"If, therefore, a trustee virtually abandons his active functions, neglects to interpose in the management, and leaves the whole control to his cotrustee (as it is conceded Fitz James Colburn did), he will be liable for losses occasioned by their wrongful acts or neglects" (Pomeroy's Eq. Jur., § 1069, and cases cited).

"The rule is firmly settled that where a breach of trust has affected two or more or all of the cotrustees with a common liability, they are liable jointly and severally; each is liable for the whole loss sustained or the whole amount due, and a decree obtained against them jointly may be enforced against any one of them" (Pomeroy's Eq. Jur., § 1081, and cases cited).

Where one trustee permits a cotrustee to receive trust funds without making due inquiry as to his dealing with it he renders himself liable. (See Pomeroy's Eq. Jur., § 1082.) It thus appears that the consent to a cotrustee's breach of trust need not be expressed; it may be implied from the trustee's conduct in refraining from taking reasonable and necessary steps to prevent or repair the loss (*id.* and cases cited).

It is submitted that the decree should be reversed and the cause remanded with directions to grant the prayers of the bill.

FRANKLIN H. MACKEY,
Solicitor for Appellants.

No. 221
Brief of Gordon for Appellee
Filed Mar. 23, 1901

Supreme Court
FILED
MAR 30 1901

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 221.

ROLLINSON COLBURN ET AL., APPELLANTS,

vs.

ROBERT E. GRANT, EXECUTOR, ET AL., APPELLEES.

Appeal from the Court of Appeals for the District of Columbia.

BRIEF FOR APPELLEE.

J. HOLDSWORTH GORDON,
Solicitor for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF CASE.

This case comes to this court on an appeal from a decree of the Court of Appeals for the District of Columbia, affirming a decree of the Supreme Court of said District, dismissing a bill in equity, filed by the appellants herein for an accounting. The case, as shown by the bill, answer and stipulation as to facts, is as follows:

On May 27, 1872, Augustus G. P. Colburn died in the city of Newark, New Jersey, leaving his last will and testament, dated May 25, 1872, whereby he devised to his son, George Fitz James Colburn, for and during his natural life, a certain dwelling-house in said city of Newark, with power to the trustees named in the will, namely, said George Fitz James Colburn and John W. Taylor, to sell the same and the proceeds to invest, and the interest to pay to the said George Fitz James Colburn during his lifetime.

Shortly after the death of the testator the real estate in Newark was sold by the trustees, the net proceeds therefrom, amounting to twenty-seven thousand ($27,000) dollars, was paid part in cash and the remainder in subsequent instalments, the latter instalments being collected by the said Taylor. In the year 1873, George Fitz James Colburn, one of the trustees, and the only son of the testator, removed from Newark, and became a citizen of Washington, where he resided, except for a few months, up to the day of his death in September, 1897. John W. Taylor, the co-trustee, was a prominent lawyer of the city of Newark at the time of his appointment; was regarded by the general public as a man of business integrity, and continued so to be up to the very day of his death, in the year 1893. On the death of Taylor, by his own hand, it was found that he had squandered many estates under his custody, amongst others the estate of Augustus G. P. Colburn, except the sum of five thousand ($5,000) dollars, which was under the exclusive control of his co-trustee, George Fitz James Colburn, in the District of Columbia, which latter sum has been turned over to appellant, Franklin H. Mackey, by the executor of the trustee, Colburn, the defendant, Robert E. Grant. It further appears that the trust estate, except the said sum of $5,000, was by said George Fitz James Colburn left solely to the collection, and to the management of the said Taylor, his co-trustee, who handled the same without the co-operation, supervision or knowledge of Colburn, the latter only requiring from Taylor the payment of the income of said estate to him as provided by the will. It also appears that upon the death of Taylor, the surviving trustee, Colburn, made a claim against the estate of the deceased trustee for the amount of the trust fund squandered, as aforesaid, and upon said claim for $22,000, realized $3,342.45. That the children of Hervey Colburn by papers writing dated respectively September 6, 9 and 11, 1895, released the claim to said sum of $3,342.45 unto said George Fitz James

Colburn, and that thereupon the said George Fitz James Colburn applied the money so received by him to the purchase of an annuity for himself, for which purpose the release aforesaid was made.

The bill in this cause was filed on the 27th day of January, 1899, nearly six years after death of Taylor, and some months after the death of said George Fitz James Colburn, against his executor, the defendant, Robert E. Grant, praying for reference to the auditor of the court to take and report an account of the trust estate of Augustus G. P. Colburn—

> "as it came, or should have come, into the hands of said trustees, and of their acts and doings in respect thereof, and for how much thereof the said surviving trustee [George Fitz James Colburn] was properly accountable at the time of his death."

On hearing before the justice holding special term for equity business the bill was dismissed with costs, and on appeal the decree below was affirmed by the Court of Appeals for the District of Columbia.

I.

The circumstances of the present case, as contained in the bill, answers and stipulation as to facts, being considered, and the law as generally applicable to such cases being applied, no liability should attach to the estate of George Fitz James Colburn, nor should any relief be granted against his personal representative, the defendant, Robert E. Grant, and the judgment below was correct.

It should be remembered that Augustus G. P. Colburn named as trustees of his estate (Rec., p. 6) his son, George Fitz James Colburn, and John W. Taylor, the latter of whom he designated as "*my friend.*" The Record shows answer and stipulation as to facts), that Taylor, at the time of his appointment and up to the day of his death, had

been a man of the very highest reputation; that he was esteemed by all, and held the most responsible positions. In a word, he had been regarded as of undoubted integrity and great business capacity, holding in both official and private relations positions of honor and financial responsibility.

In considering the phases of the present case we must regard all the inducements that led the surviving trustee, Colburn, to pursue the course for which his estate is now charged.

Let us turn to the house in Newark on May 25, 1872. We may presume that Augustus G. P. Colburn was on his dying bed, for he departed this life on May 27, 1872. He was about to bid farewell to those whom he had loved. He had but one son and for him he wished to care. The dying testator ran over in his mind all of those whom he could best trust to care for that son's interest and his choice rested upon John W. Taylor, to whom, almost with his dying breath, he applied that most affectionate term "my friend." He thought his selection well fitted to manage the affairs of the estate. The naming of the son as co-trustee, was of but secondary consideration in the parent's mind. The "friend" was versed in such matters, and he (the testator) felt that in his hands the interest of the son was safe. And this was the state of affairs as they were presented to the son and co-trustee at the father's death. The property was sold, partly for cash and balance in installments, which latter were collected by Taylor (Stipulation, page 11). The opinion of the father was naturally entertained by the surviving trustee, the son; who, knowing the confidence felt by his parent, only followed the example set him, by reposing like confidence in Taylor. Surely, there was nothing to put him on inquiry, or to suggest that there was any danger to the fund. Five thousand dollars of the fund realized was committed to the care of George Fitz James Colburn; by him invested, and is now in the hands of the plaintiff, Mackey,

trustee. The balance was left in the hands of Taylor in Newark for investment and was, presumably, invested when received. And so the matter moved along. The life tenant received the income from the estate with regularity. Taylor continued to hold the confidence of the public, and, in the words of the stipulation—

> "Was a prominent lawyer of the city of Newark at the time of his appointment and continued so to be up to the date of his death in the year 1893, and he was regarded by the general public as a man of business integrity, at the time of his death, by his own hands, on the 20th November, 1893."

It was in such a man that the son, George Fitz James Colburn, continued to have full faith; the man of high reputation, his living and dying father's *friend*. As above stated, his interest was regularly transmitted to him, and this fact, coupled with the trustee's standing was, naturally, sufficient to justify his remaining passive in the premises. He had moved away from Newark in 1873, and had become a citizen of Washington. He was far away from the fund, and left the affairs at Newark to the control of the trustee on the spot. In so doing, did he not do precisely what nine out of every ten men would have done under similar circumstances? The fact of Taylor's defalcation came upon him as upon every one else, as a deadly flash of lightning from a cloudless sky—without the slightest premonition. It is submitted, with confidence, that George Fitz James Colburn's course is to be judged, *not* by the facts of the case *as they now appear to have existed, but as they appeared to him and to others to exist at the time.* As the justice dismissing the bill in the equity court aptly remarks—

> "after a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold some one else fairly responsible for it, the point of view held by the party sought to be made liable *at*

> *and before the loss occurred is the only safe point of view to assume"* (Rec., p. 16).

And the court then very justly adds:

> "From the light of the circumstances as thus shown, I can not convince myself that George Fitz James Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor" (Rec., p. 16).

And the Court of Appeals in the opinion, affirming the lower court say (page 23):

> "But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz-James Colburn or any proof of negligence on his part in the supervision of the trust in such manner as to render himself, or his estate, liable."

The holding of the Court of Appeals is undoubtedly in agreement with the generally accepted doctrine.

In Hill on Trustees, Bispham's Edition (4th), in note on page 470 the editor says:

> "The liability of co-trustees and executors for each others' acts does not appear to have been always as rigorously enforced in the United States as the later English authorities stated in the text would justify. Judge Story, in his Commentaries on Equity Jurisprudence, Sec. 280, uses the following language: 'The general rule is that they are responsible only for their own acts and not for the acts of each other, unless they have made some agreement by which they have expressly agreed to be bound for each other, or they have, by their voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust.'"

The case of The State of Ohio *vs.* Guilford, 18 Ohio, 500, passes on this question, and is a well considered and very instructive case. Here was a defalcation of one of several trustees, the former having been permitted to exercise exclusive control over the trust estate. The subject of the trust was a charity fund for the benefit of the poor and distressed. The court in passing on the matter said (508):

> It will be the fixed purpose of this court to guard most vigilantly the charities created within its jurisdiction, and in no one would we regard remissness of duty in the administrators with keener jealousy, than in the management of a fund appropriated by benevolence, to the elevation in the scale of humanity of the poor and helpless."

Surely in such a case as the above, if ever, the doctrine invoked by the plaintiff should be enforced. And yet says the court (508):

> "We must in this class of cases, as well as in all others, apply to the individual transaction those general rules which are the offspring of wisdom and experience, and determine, upon the particular circumstances of the case, whether these rules attach a penalty or not."

And such we claim should be the rule applied in the present case. The court, continuing, after reviewing authorities on the subject, adds, approving *Ex parte* Belcher *vs.* Parsons, Ambler's Report, 219:

> "These rules should not be laid down with a strictness to strike terror into mankind, acting for the benefit of others . . . to add hazard and risk (to the trouble) and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be deterring everyone from accepting so necessary an office" (510).

The court further dwells upon the fact that the defaulting trustee was the one who enjoyed the special confidence of

the testator, and then says: "Ought the defendants" (the other trustees) "to have required bond?" and as a reason for a negative answer adds: "He was their co-trustee, possessing character and responsibility," etc.

The court finally says:

> "It is most probable that if their own private property, to an equal extent, had been managed by Williams they would have taken no greater precautionary measures to insure its safety" (512).

And this seems to be the maximum care required—the same care that a man would exercise in his own case.

The court also quotes, with approval, from Howard *vs.* Webster, Select Cases in Equity, 53, as follows (513):

> "To require him (defendant) to have dealt with his colleague as a rogue, by calling upon him for the securities, would require of him the highest and most exact vigilance, a degree of it that would ruin every guardian. No rate of compensation would compensate the risk of such a trust, and no man would accept."

In conclusion the court declares:

> "We make application of all these wholesome rules of conduct to the circumstances spread before us, and upon the whole case, both in regard to law and the evidence, after a careful examination, we find ourselves forced to the conclusion, that upon none of the grounds which have been assumed by counsel for the plaintiffs, are the defendants to be charged with the loss sought to be fastened upon them. They have acted with entire good faith, and with reasonable diligence."

Surely if the court should have thus decided, in a case like the one referred to, there should be no responsibility placed upon the defendant in the present case, in view of all the surroundings, as he was guilty neither of fraud, culpable negligence, or collusion, but only followed the example

set him by his father, who had full faith and confidence in Taylor, which the son had every reason to have also, in view of Taylor's standing in the community, and generally recognized integrity.

In Boyd's Exrs. *vs.* Boyd, 3 Gratt. 113, the court follows the same reasoning as in the cases above, saying:

> "This court is further of opinion that in this transaction the executors acted as trustees, and as such can only be held for their respective receipts, unless some circumstances of fraud, or of gross neglect amounting to fraud, appeared in the case."

In Latrobe *vs.* Tiernan, 2 Md. Chan. 449, speaking of liability of trustees for acts of their co-trustees, the court says:

> "They are only responsible for their own acts, and not for the acts of each other, unless they have made some agreement by which they have engaged to be bound for each other, or they have by their own voluntary co-operation or connivance, enabled some one or more of them to violate the trust."

See, also, Stell's Appeal, 10 Barr. 150.

It has been suggested by the complainants that bond should have been required by the co-trustee. As above stated, he had no reason to suppose such a course necessary. Bnt why was it more incumbent on him to take such a step than on the complainants here? They were contingent remaindermen. Indeed, they were, in view of the age of the parties, life tenants, virtual vested remaindermen, as the probability of birth of children to the life tenants was very remote, and that was the only event under which the complainants' interest could be divested. If they deemed the course pursued by George Fitz James Colburn negligent, they had a full right to come into court and ask for a bond from both parties, and the court would have granted it, upon

a reasonable showing. They did not do so, because, like Colburn, they deemed Taylor a man of probity and in every way worthy of confidence. They were deceived just as he was, and are as much to blame, if any blame exists.

The language of the equity judge in this connection, is well considered and persuasive (Record, page 15).

> "I think it may well be presumed that the remaindermen knew just as much about the situation as the surviving trustee did during Taylor's life; that they knew the $5,000 was in this city, in Colburn's hands, and the $22,000 in Newark, in Taylor's hands, and that the income was regularly paid to the life tenant, and if they had any knowledge of anything that would in any way indicate that the estate in Taylor's hands was in peril, and had reason to believe Colburn was ignorant of it, and yet did nothing themselves to inform Colburn or call Taylor to account, that would have been bad faith on their part, sufficient to bar them from recovery in this suit. I do not believe, however, that they had any such knowledge of wrong doing, but I do believe they and Colburn alike had implicit faith and confidence in Taylor until after his suicide, and the subsequent proceedings indicate that they were in perfect harmony, and that the remaindermen made no claim that Colburn was to blame or that he was in any way responsible for the loss they had jointly sustained while the said Colburn lived, nor until the filing of this bill since his death."

In Banks *vs.* Wilkes, 3 Sanford, 108 (99), this subject was also before the court. In this case the entire trust fund had been kept and was under the exclusive control of one trustee. The claim was made that:

> "The act of placing these securities in his hands or suffering him to take possession of the same, was a breach of trust, which subjects them to all the consequences flowing from his control over the securities."

The court held that no responsibility existed, as:

> "The loss in question occurred before there was any known reason or cause for the defendants to interfere with the trustee's possession of the bonds and mortgages."

See, also, Hill on Trustees, 311, where the trust fund was administered by one of the trustees who lived in London, with the permission of the others who lived in Cornwell. The court holding that this was not unreasonable. See, also, cases referred to by same author in sections 311 and 312.

It must not be forgotten that the trustee (Colburn) moved from the city of Newark in 1873, and never lived there after. And, further, that the fund by him exclusively administered, to wit, five thousand dollars, was fully accounted for.

The Court of Appeals after going over the Record before them say (page 22):

> "The question in the case is, whether, under the circumstances stated, a trustee can be held liable for the malfeasance of his co-trustee. The principles of law applicable to the case are simple enough, and there is no real controversy between the parties in regard to them. The controversy is rather one of fact than of law, or rather it is whether an inference of negligence can be drawn from a certain conceded state of facts"—

and after carefully reviewing the facts dismiss the bill in the following language (page 23):

> "But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz James Colburn, or any proof of negligence on his part in the supervision of the trust in such manner as to render himself or his estate liable. . . . It is very evident that the testator had confidence in Taylor, . . . and the joinder of Taylor in the trust is, under the

circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust, and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor, other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think that it would be reasonable to infer, from this fact alone, that Colburn abandoned the trust, and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different conditions arise? It does not anywhere in the record appear how this fund of twenty-two thousand dollars, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having been once invested, there was even need or occasion for reinvestment. . . . That Taylor obtained control of the fund and misappropriated it is very clear; but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week, or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misapplication may have been an afterthought. We can not infer delinquency on the part of Colburn when there is no more proof than is contained in this record, that, by his abandonment of his trust, or by his negligence in the supervision of it, he had put it in the power of his co-trustee to prove faithless to his duty. Abandonment of discretionary power by a trustee to his

co-trustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment nor negligence is to be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the inference, and we do not find that proof in the statement of facts contained in this record."

The above extract appears to meet the full exigencies of the case before us, and is conclusive as to the correct holding of the lower court.

II.

But there is still another reason why the bill should have been dismissed. It will be remembered that when the trustee, Taylor, died, and it appeared that he was a defaulter, the co-trustee, Colburn, immediately presented his claim, as such, against the defaulting trustee's estate. As a result there was paid to the said Colburn about thirty-four hundred dollars. The parties in interest met together, and, by mutual agreement, Colburn was permitted to secure by means of this fund, an annuity, for himself, all the parties waiving any interest, in writing, in the fund. It is confidently claimed that this was a meeting of the parties in interest and a statement of accounts between them and a full acquittance of any further demand. It was undoubtedly so intended, and this claim now is an afterthought born of advice of counsel that there might be a possibility of success in event of suit. Can it be for a moment doubted that such was the intention of all parties? Surely not. This court has the right to regard it as so settled, and to consider the present parties complainant estopped from coming into court as they now do to invoke its aid, in a manifestly unjust demand. Particularly so when the co-trustee, upon whom the reflections are made, is now unable to speak.

Indeed, though Taylor died on November 20, 1893, and his co-trustee, Colburn, lived until September 21, 1897, four

years, there never was, so far as the Record shows, any evidence of an intention to hold the latter responsible for the defalcation of the former.

In whichever light the circumstance may be viewed; as an estoppel, or as a presumption of fact, with all its effective and persuasive result, it bears out the contention of the appellees, that a full settlement was intended and was had at that time.

To sum up, it is contended for the defense that:

First. Under the authorities, as applicable to the facts of the case, no liability exists.

Second. That there was an equitable settlement between the parties in interest, as shown by the written releases filed, and that the complainants are equitably estopped from making the claim now advanced.

Third. There being a failure of equitable right, the bill was properly dismissed, and the decree below should be affirmed.

J. HOLDSWORTH GORDON,
Solicitor for Appellees.

Supreme Court of the United States.

No. 221.—October Term, 1900.

Rollinson Colburn and others, Appellants, vs. Robert E. Grant, Executor, and others. } Appeal from the Court of Appeals of the District of Columbia.

[May 20, 1901.]

This is an appeal from a decree of the Court of Appeals of the District of Columbia, which affirmed a decree of the Supreme Court of the District dismissing a bill in equity, which had been filed in that court. The complainants were legatees of one Augustus G. P. Colburn and their trustee, Franklin H. Mackey, against Robert E. Grant, the executor of the estate of George Fitz James Colburn, a deceased trustee of the estate of said Augustus Colburn, for an accounting, it being alleged that there had come into the hands of said trustee and his cotrustee, both of whom were deceased, a large sum of money, namely, $28,000, and that only $5,000 thereof had been accounted for. The codefendants of the defendants' executor were those persons who would be entitled to distribution of his testator's estate. The case was heard upon the pleadings and an agreed statement of facts.

The stipulation of facts was as follows:

"In order to obviate the expense of taking testimony in relation thereto, it is hereby stipulated and agreed that the following are conceded as facts, and that the statements herein may be read and taken in this cause as established.

"That the complainant Franklin H. Mackey, trustee, was appointed by decree of this court in equity cause No. 18728, and has qualified as such.

"That the complainants Rollinson Colburn and Edward A. Colburn are the only surviving children of Hervey Colburn, who was a brother to Augustus G. P. Colburn.

"That the complainants Elizabeth F. Colburn, Gertrude H. Colburn, F. Helen Colburn and Louise B. Colburn are the only children of H. Hobart Colburn, a deceased child of the said Hervey Colburn; that said H. Hobart Colburn predeceased the said George Fitz James Colburn, and that all the above-named parties are now of full age.

"That George Fitz James Colburn died in September, 1897, unmarried and without issue, his wife having died before him, and that all the brothers and sisters of Augustus G. P. Colburn predeceased the said George Fitz James Colburn except P. D. Miranda Kimball, who died on the 22d day of December, 1897.

"That under the will of the said Augustus G. P. Colburn the said George Fitz James Colburn and John W. Taylor were named as trustees, without bond, for the management of the trust portion of said estate, with power to sell the same.

"That the real estate in the city of Newark, State of New Jersey, mentioned in the will of the said Augustus G. P. Colburn, was sold by said trustees shortly after the death of the testator, the net proceeds arising therefrom amounting to twenty-seven thousand dollars, which was paid part in cash and the remainder in subsequent instalments, the latter instalments being collected by the said Taylor.

"That the said George Fitz James Colburn removed from the city of Newark in the year 1873 to the city of Washington, D. C., where he resided, except for a few months, up to the day of his death.

"That John W. Taylor, one of the said trustees, was a prominent lawyer of the city of Newark at the time of his appointment, and continued so to be up to the date of his death in the year 1893, and that he was regarded by the general public as a man of business integrity at the time of his death by his own hands on November 20, 1898.

"That after the death of the said Taylor it was found that he had squandered many estates under his custody, amongst others the said estate of Augustus G. P. Colburn, except the sum of five thousand dollars, which was under the exclusive control of the said George Fitz James Colburn, and which latter sum of $5,000 has been turned over over by the executor of said George Fitz James Colburn to said Franklin H. Mackey, trustee, by order of this court in equity cause 18728.

"That the said trust estate, except the said sum of five thousand dollars referred to, was by the said George Fitz James Colburn left solely to the collection, management and discretion of the said Taylor, who handled said sum without the co-operation, supervision or knowledge of the said George Fitz James Colburn, the latter only requiring from said Taylor the payment of the income of said estate to him, said George Fitz James Colburn, as provided by said will.

"Upon the death of said Taylor, trustee, the said George Fitz James Colburn, as surviving trustee, made claim against the estate of said Taylor for the amount of the trust fund by him squandered, as aforesaid, and upon said claim of twenty-two thousand dollars he received a dividend of $3,342.45.

"That by papers writing dated respectively September 6, 9 and 11, 1895, Rev. Edward A. Colburn, Rollinson Colburn, and H. Hobart Colburn released all claim to the said $3,342.45 unto the said George Fitz James Colburn, and that thereupon the said George Fitz James Colburn purchased an annuity for himself, which he enjoyed until his death. Said paper writing is in the following form: 'I hereby give my full assent that my cousin, George Fitz James Colburn, shall have full right to use the sum of $3,342.45 received by him from his father's estate, should he so have need, and do resign any interest I may have in said sum of $3,342.45 if he so desire to use it.' Originals of above paper to be filed in this suit."

Mr. Justice SHIRAS delivered the opinion of the Court.

The case was heard in the Supreme Court of the District on bill, answers and an agreed statement of facts. Some complaint is made in appellants' brief of the alleged fact that the court treated certain allegations in the answer of the defendant executor as evidence, although an answer under oath had been dispensed with, and it is said that only those portions of the

answer which admitted the allegations of the bill, or contained admissions against interest, should have been considered.

We are inclined to think that, upon the record made up and presented at the hearing, the court had a right to consider all the allegations of the answer. No replication, putting the allegations of the answer in issue, appears to have been filed, and the court may have well supposed that the complainants had agreed to have the case disposed of on bill, answers and stipulation. If such a course was a surprise to counsel, application should have been made to have the decree suspended, and for leave to take rebutting evidence.

However, we have examined and compared the respective allegations of the bill and answer, and do not perceive that, even upon the theory of appellants' counsel, any such substantial difference in the facts could have been made to appear as would have justified a different result.

Not only, then, is there an agreement as to the controlling facts, but there also seems to be little or no controversy in respect to the principles of law involved. The learned counsel for the appellants concedes, in effect, the propositions of law found in the opinion of the Court of Appeals, but contends that a proper application of those propositions would call for a different decree.

The purpose of the bill is to have the estate of George Fitz James Colburn held liable for a defalcation by John W. Taylor, who was united with said Colburn in the administration of a trust estate created by the will of Augustus G. P. Colburn, father of George F. J. Colburn.

The father, who was a resident of Newark, New Jersey, died on May 27, 1872, and in his will, dated May 25, 1872, devised to said son, for and during his natural life, a certain dwelling house and lot in said city, with power to the trustees named in the will, who were his said son and John W. Taylor, to sell the same at any time, and to invest the proceeds of such sale as advantageously as possible, and to pay over the income arising therefrom to his said son during his life. Shortly after the death of the testator the trustees sold this real estate for the sum of $27,000, which was paid partly in cash and partly in instalments. George F. Colburn subsequently removed to the city of Washington, where he died in September, 1897.

John W. Taylor was a prominent lawyer in the city of Newark at the time of his appointment, and continued so to be up to the date of his death, and was regarded by the general public as a man of business integrity at the time of his death by his own hand on November 20, 1893.

After Taylor's death it was discovered that he had squandered many estates in his custody, among others the said estate of Augustus G. P. Colburn, except the sum of $5,000, which was under the exclusive control of George F. J. Colburn, and which latter sum is not in controversy here.

Upon the death of Taylor, George F. J. Colburn, as surviving trustee, made claims against the estate of Taylor for the amount of his defalcation in the estate of Augustus G. P. Colburn, and upon said claim of twenty-two thousand dollars he received a dividend of $3,342.45. The amount so received was subsequently, with the consent of the residuary legatees under his father's will, invested by George F. J. Colburn in an annuity for himself, which he enjoyed until his death.

Without going into further details, it is evident, and, indeed, is conceded, that George F. J. Colburn was not involved in the dishonest acts of his cotrustee, and which resulted in the loss of the larger part of the trust estate. Nor is it contended that, as a matter of law, was George F. J. Colburn liable for the malfeasance of his cotrustee.

What is contended is that an abandonment of discretionary power by a trustee to a cotrustee, where the trust is entitled to the united discretion of both, is such an act of supine negligence as to render the trustee who has abandoned his active participation in the management of the trust liable for the losses occasioned by the misconduct of the cotrustee; that George F. J. Colburn did so abandon his functions as trustee, and that, accordingly, he was, and his estate now is, liable for the money misapplied by Taylor.

The courts below did not refuse to recognize the soundness of appellants' statement of the law as a general proposition, and, indeed, stated it strongly in the following language:

"Cotrustees may not act independently of one another, nor ignore each other in the management of the trust. The trust is entitled to the united judgment, discretion and ability of all the trustees selected. For this reason they may not delegate discretionary powers among themselves."

But it was the opinion of those courts that, while such is the general doctrine, yet that the facts of the present case do not call for its application; that the conduct of Colburn was not in the nature of an abandonment by him of duties devolved upon him as trustee under his father's will.

The Supreme Court thus expressed its conclusion:

"After a loss has occurred, as in this case, by the positive fault of some one, it may be easy to say how it could have been prevented; but in order to hold some one else fairly responsible, the point of view held by the party sought to be made liable at and before the loss occurred is the only safe point of view to assume. . . . From the light of the circumstances shown, I cannot convince myself that George F. J. Colburn was guilty of any such negligence as to render him liable, nor that the claim now made by the bill in this case is a proper one to be allowed against his executor."

The Court of Appeals, after a full statement of the facts and the law applicable thereto, expressed the following conclusion:

"But we fail to find in the agreed statement of facts sufficient proof of the abandonment of the duties of the trust by George Fitz James Colburn

or any proof of negligence on his part in the supervision of the trust in such manner as to render him or his estate liable.

"It is true that it is said in the statement that the trust estate, to the extent of twenty-two thousand dollars, was left by Colburn to 'the collection, management and discretion solely of Taylor,' and that Taylor 'handled said sum without the co-operation, supervision or knowledge of Colburn.' But this is not sufficient. The statement may be consistent with the relinquishment only by Colburn of the ministerial duties which he might well have intrusted to Taylor. In order to hold Colburn responsible there should be some evidence of abandonment by him of the discretionary duties which it was not proper for him to delegate to his cotrustee.

"It is very evident that the testator had confidence in Taylor, whom he designates as his friend, and who was in all probability his legal adviser; and the joinder of Taylor in the trust is, under the circumstances, strong evidence that it was the testator's intention that his should be the controlling mind in the management of the trust; and this view is fully corroborated by the fact that Colburn, in view of his own special interest in the trust and that there was a residuary devise of the trust fund, might not be entirely impartial or entirely judicious in such management. If the real estate which originally constituted the trust fund had remained unsold, and no duty had been imposed on the trustee Taylor other than to collect the rents and to remit them to Colburn in Washington, and this duty had been left exclusively to him, we do not think that it would be reasonable to infer from this fact alone that Colburn had abandoned the trust; and yet in that contingency this would have been the only duty to be performed under the trust, except the payment of taxes and insurance, and all this would necessarily have been under the supervision of Colburn and subject to his approval and ratification in the acceptance of the rents remitted to him. When the real estate was sold and the proceeds invested or reinvested, did any different condition arise? It does not anywhere in the record appear how this fund of twenty-two thousand dollars, alleged to have been left to the management of Taylor, was invested. It does not appear that, after having been once invested, there was ever need or occasion for reinvestment. Indeed, it may reasonably be conjectured that the amount remained as a mortgage on the property sold; and inasmuch as there is nothing to show that such mortgage was ever paid and that the proceeds were reinvested, it would not be unreasonable to assume that the investment remained as it was first placed. At all events, we cannot assume the contrary in the absence of proof. We cannot assume that the money became due, and that Taylor received it and reinvested it without the concurrence of Colburn, or that he wholly failed to reinvest it and converted it to his own use. That Taylor obtained control of the fund and misappropriated it is very clear, but when, or how, or under what circumstances he did so, we are not told. For all we know, he may have come into possession of the fund in the last week or the last month of his life, and he may have been the ministerial agent to receive the money when it was due and payable. He may have come properly into possession of it, and the misappropriation may have been an afterthought. We cannot infer delinquency on the part of Colburn where there is no more proof than is contained in this record that, by his abandonment of his trust, or by his negligence in the supervision of it, he had put it in the power of his cotrustee to prove

faithless in his duty. Abandonment of discretionary power by a trustee to his cotrustee is a fact to be proved by him who alleges it, and so likewise is negligence in the supervision of a trust. Neither abandonment nor negligence is to be implied without satisfactory proof of the fact or of circumstances sufficient to warrant the inference, and we do not find that proof in the statement of facts contained in this record."

Another fact in this case is not without weight.

After Taylor's death, and when it appeared he was a defaulter, Colburn at once presented a claim, as cotrustee, against his estate, and was allowed a dividend in the sum of $3,342.45. Thereupon the residuary legatees consented in writing that Colburn should have a right to use said sum in the purchase of an annuity on his own account.

While we are not disposed to accept the suggestion, on behalf of the appellees, that by consenting to such a use by Colburn of the money received from the estate of Taylor, the residuary legatees were estopped from claiming liability for the rest of the fund misapplied by Taylor, we yet think that such a consent tends strongly to show that the residuary legatees, who were fully aware of all the facts and circumstances, did not regard Colburn's conduct as subjecting him to liability for Taylor's misconduct. And the further fact, shown by the record, that no intention to hold Colburn for Taylor's defalcation was ever disclosed till more than two years after Colburn's death, and nearly six years after that of Taylor, tends to show that the effort to so hold him is an afterthought, not entitled to the approval of a court of equity.

The treatment of facts and law in the opinions of the courts below, contained in the record, was so full and satisfactory as to relieve us from further discussion.

The decree of the Court of Appeals of the District of Columbia is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.